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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 203

CONTINENTAL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

CONTINENTAL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 17, 1959 (App. 28a), affirming the order of Respondent Federal Power Commission[1] entered in Docket G-5346 against Continental[2] insofar as said order directed issuance of a certificate of public convenience and necessity for a production facility, i.e., portion of the christmas tree assemblage of Continental on a certain gas well located in Lea County, New Mexico, upon the holding that such christmas tree assemblage also constituted a sale facility.

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[1] Respondent Federal Power Commission will be referred to as *Commission;* Petitioner Continental Oil Company will be referred to as *Continental;* the Natural Gas Act will be referred to as the *Act.*

[2] The record certified from the Court below will be referred to as *R;* the Appendix to this Petition as *App.*

OPINIONS BELOW

The Commission issued an order (R. 161, App. 41a) reversing the initial decision by the Presiding Examiner issued May 1, 1957 (R. 154, App. 34a). The majority and dissenting opinions in the Court of Appeals rendered April 17, 1959, are reported in 266 F. 2d 208, and set forth in the Appendix hereto (App. 1a, 9a).

JURISDICTION

The judgment of the Court of Appeals was entered April 17, 1959 (App. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and the Natural Gas Act, § 19(b).

QUESTIONS PRESENTED

1.

Where an independent producer makes a well-head sale of natural gas admittedly subject to the jurisdiction of the Federal Power Commission, does Section 7(c) of the Natural Gas Act: (a) require the Commission in issuing a certificate of public convenience and necessity for such sale, to conjoin in such certificate one covering some physical facility, and (b) empower the Commission, where such producer neither has nor operates any physical facility for such sale, to certificate a physical facility of production as though it were a sale facility despite the express provisions of Section 1(b) of the Act denying and prohibiting Commission jurisdiction over all production facilities?

2.

In a review pursuant to Section 19(b) of the Natural Gas Act, is the United States Court of Appeals author-

ized, as basis for its decision, to make its own independent finding different from, and contrary to, that which the Federal Power Commission made the basis of its decision where the judicial finding is unsupported by and contrary to the undisputed evidence in the record?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 15 U.S.C. § 717, et seq.) are set forth in the Appendix filed herewith (App. 29a-33a).

STATEMENT

(a) The Proceedings before the Federal Power Commission.

On November 29, 1954 (R. 142) under compulsion of Commission Order 174-A (19 Fed. Reg. 7081), Continental filed (involuntarily under protest) an application for a certificate of public convenience and necessity covering well-head sale of dry natural gas to El Paso Natural Gas Company (El Paso) from a well in Lea County, New Mexico. It prayed that jurisdiction be disclaimed. Simultaneously, Continental petitioned for declaratory order of non-jurisdiction (R. 149).

After a hearing, participated in only by Continental and the Commission Staff, the Presiding Examiner issued his decision (R. 154) dismissing the application for lack of jurisdiction; adjudging that such sale was not one in interstate commerce;[1] and that none of Continental's facilities were facilities for sale or transportation of gas in interstate commerce. On the latter point the examiner said:

---

[1] After appeal, Continental withdrew its objection to Commission jurisdiction over the sale, and conceded such sale to be subject to Commission jurisdiction.

"(4) The facilities owned by Continental are not facilities for the sale or transportation of gas in interstate commerce. No provision of the Natural Gas Act requires Continental to apply for or obtain a certificate of public convenience and necessity authorizing the drilling of a gas well, the installation of the well-casing, the casing head, the bleeder valve, the master valves or any of the facilities owned by Continental as part of the well here involved. No case decided by any Court, and no decision or order of this Commission has been cited or found that requires the certification of the sale or of the facilities here involved. Continental engages in no transportation of the gas here involved. Movement of gas in a gas well is not transportation of gas." (R. 160).

The Examiner (R. 156) noted that none of Continental's evidence was controverted; that the Staff introduced no evidence. "Hence", the Examiner declared, "these undisputed facts [substantial, we think] are enumerated as necessary findings of fact *being conclusive*[4] by reason of being the *exclusive evidence of record*." (Footnote 4, R. 156).

Sustaining the Staff's exceptions to the Examiner's decision (Certified R. 172-182),[5] the Commission reversed

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[4] All emphasis supplied by writer unless otherwise noted.

[5] These exceptions were a part of the record certified by the Commission to the Court below but were not designated by the Staff for inclusion and printing in the Joint Appendix. This sentence from Staff's exceptions fairly epitomizes its position on facilities: "It cannot be successfully contended that the sale in this instance can be effectuated without aid of applicant's (Continental's) facilities here involved." (Certified R. 180). Reliance was laid on *Huber Corporation* v. *Federal Power Commission* (1956, 3 Cir.) 236 F. 2d 550, cert. den. 352 U.S. 971; *Saturn Oil & Gas Co.* v. *Federal Power Commission* (1957, 10 Cir.) 250 F. 2d 61, cert. den. 355 U.S. 956, and *Hartford Electric Light Co.* v. *Federal Power Commission* (1942, 2 Cir.) 131 F. 2d 953, cert. den. 319 U.S. 741. Such cases were also relied on by the Court below (Fn. 4, App. 5a, App. 8a) and are discussed hereafter.

(R. 161). It concluded that such sale was jurisdictional so that a certificate of public convenience and necessity "authorizing such sale" should issue (R. 166).

It adopted Staff's views that even though the christmas tree was a facility of production, it could also be termed a facility of sale, because it aided or promoted effectuation of the sale. Said the Commission:

> "* * * it is apparent that such portions of the 'Christmas tree' that are owned by Continental and serve to contain the gas at the point of delivery are facilities for effecting the sale of gas in interstate commerce, *regardless whether they serve also to effect production. Saturn Oil & Gas Company, supra.* (Italics by the Commission) 'Agere sequitur esse' says the logic primer: What a thing is is determined by what it does. It cannot reasonably be contended that the sale in this instance can be effectuated without the aid of Continental's facilities herein involved." (R. 167-8).

It then declared that an interstate sale could be made "only by means of interstate selling facilities" (R. 168), which had to be *certificated.*

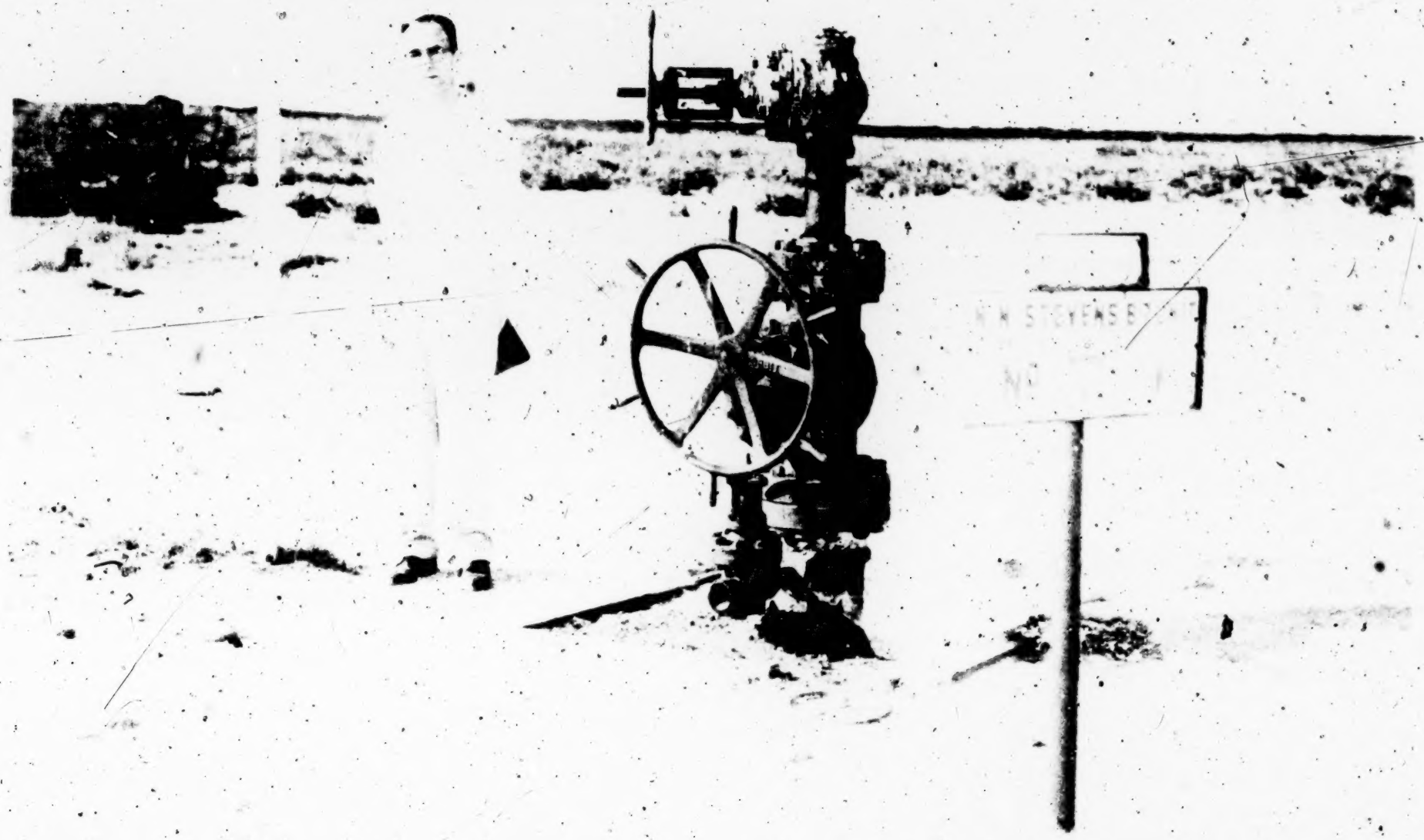
Commissioner Digby concurred in that part of the order granting a certificate *for the sale;* but objected to issuance of a certificate "for the facilities of the independent producer or gatherer of gas" (R. 173-4). In his view, in our submission correct, the issue was whether the Act required certification of facilities in conjunction with issuance of a certificate authorizing the sale, suggesting that where construction of facilities was necessary to effect the sale, it was then subject to certification, but that power was denied the Commission either to compel construction or to certificate a producer's facilities.

Continental filed an application for rehearing specifying errors on the question of facilities (#16, 18-19 (R. 184); #20-34, 37-48 (R. 197-203); #53 (R. 219)) which the Commission denied (R. 226).

Attached is a photograph (Ex. 3) of the Stephens B-7, Unit No. 1 Well involved herein (R. 101). The vertical black and silver installation is called a "Christmas tree". Continental owns and installed the portion colored black. The purchaser, El Paso, owns, installed and operates the portion colored white (R. 107). The picture reflects the following:

Between the ground and the bottom circular flange is the casinghead. The casinghead is bolted to the bottom flange of a 7" master valve (R. 101-2). The circular flange at the top of the 7" master valve is bolted to the bottom flange of a 4" master valve (R. 103-4). El Paso screwed a 4" x 2" reducing swage (colored white) for a depth of one inch in the top of Continental's 4" master valve (R. 104). The top of the swage screws into a tee from which the white horizontal line takes off, thence to run into the ground and connect ultimately with El Paso's pipeline facilities (R. 104-5).

Continental's two master valves are necessary to production of the gas. They were installed as an essential part of completion in January, 1949 (R. 105). The initial sale contract is dated June 23, 1949 (Ex. 1, R. 94). Thus the two master valves (colored black), stood for six months before a sale was made or delivery of gas commenced. They were not altered or changed because of the sale and remain today precisely as installed in the course of drilling and completion. In addition to their fundamental function with production, they served a safety function, for either could be closed while damage from wear and tear, always experienced, was repaired (R. 103).



Their installation and operation had nothing to do with any sale of such gas, for they would be installed and operated irrespective of sale, and serve no function or use to throttle or regulate volume of delivery or rate of flow. They are designed to be used wide open or fully closed (R. 106).

By the operation of its facilities, El Paso regulates and controls the flow and volume of gas delivered. It makes periodic reports thereon to Continental, which has nothing to do with such facilities (R. 110-11). Continental's two master valves have not been manipulated since sale of gas began in June 1949 (R. 112).

(b) The Judgment of the Court of Appeals.

Continental filed a petition for review pursuant to Section 19(b) of the Act to set aside the Commission's order. The Commission appeared in defense of its order.

In the Court of Appeals, Continental conceded that the sale was jurisdictional so that an authorizing certificate of public convenience and necessity should issue.

The only question submitted to the Court below was the authority of the Commission to issue a certificate pursuant to Section 7(c) of the Act covering only a facility of production in contravention of the express prohibition of Section 1(b) of the Act by the device of declaring that no sale could be made without some physical facility hence this "production facility" could also be named a "sale facility".

The Court of Appeals, Judges Tuttle and Jones concurring, affirmed the Commission (App. 1a). The Court erroneously reasoned that Section 7(c) required, in addition to a certificate authorizing the sale, a certificate authorizing facilities, and independently held, without supporting evidence but in the teeth of the uncontradicted record, that

some of Continental's facilities were used for such sale which were not facilities in the production of such gas. It ignored specific decisions of this Court, notably *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company* (1949) 337 U.S. 498, clearly defining facilities of production by which it should have been controlled. It seemed obsessed with stated lack of specificity of "facilities" in the Section 1(b) language, "or to the production or gathering of natural gas" which *Panhandle* (p. 504-5) had laid to rest. It read the Act divorced from word meanings prevailing in the industry regulated by the Act, substituting instead its own general idea of the meaning of "produce", "production", etc., used in the Act, rather than ascribing to them, as Congress obviously must have intended, their use and meaning in the industry.

Finally, it did not accept the Commission's stated rationale underlying its order, i. e., that an admitted facility of production could be pressed into service as a facility of sale because no sale could be effected without a facility therefor. Instead, it boldly proceeded to make its own independent finding, (without any support in, but against, the uncontradicted evidence in the record), that the record showed the existence of facilities "for the sale of the gas that are not facilities of production." (App. 5a).

It arbitrarily and without right utilized for that purpose the very facility (master valves of the Christmas tree) which the uncontradicted record showed to be a facility of production only, and which the Commission, equally arbitrarily and without right, said doubled in brass also as a sale facility. Section 19(b) of the Act vested the Court below only with the limited power to review whether there was substantial evidence to support the Commission's findings and whether the Commission's order was within the ambit of its statutory authority. This the Court abandoned,

assuming in its place to exercise original judicial power, which, in our respectful submission, was without warrant at the law.

Judge Brown filed a strong and articulate dissent (App. 9a). He reasoned, correctly we insist, that the Court's preoccupation with the omission of the word "facilities" from the production exclusion of Section 1(b) was in fact conclusively governed by the clear and emphatic holding of this Court in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company* (1949) 337 U.S. 498, 504-5, and that the Court's decision should have conformed thereto. Both as to the question of the proper and natural meaning of the production exclusion and, more importantly, of this Court's declarations in the same case sustaining the integrity of the absolute prohibitions on basic power in Section 1(b) over facilities of production, he pointed out that *Panhandle* merely served to gather together and illuminate the emphatic statements theretofore contained in *Interstate Natural Gas Company* v. *Federal Power Commission* (1947) 331 U.S. 682-690. See, too, *Phillips Petroleum Company* v. *Wisconsin* (1954) 347 U.S. at 678.

He pointed out the impermissibility of a finding made by the Court which had only the power to review. He suggested that the Court was passive to the invasion of Section 1(b), an action declared to be pursuant to Section 7(c), because it wrongly assimilated facilities to sale in total disregard of production. This proceeded, he said, from considering "the 'facilities' as co-extensive with the needs for delivery of sale wholly apart from consideration of production". This in turn led to the error of the Commission's view which the Court adopted, that any equipment required to contain gas at the point of delivery was necessarily a facility for such sale. The independent finding of the Court was further suggested as improper in that the Court re-

fused to determine the meaning of the statutory terms as they were understood in the industry, for which the statute was passed, relying, rather, on what the Court felt was ordinary, non-technical usage. This interpretation of "production" or "production facilities" in terms of non-industry connotation by the Court was declared to be portentous, for, Judge Brown reasoned, that if first the Court declared all of the facilities which permitted an effective production were also necessary to effectuate a sale, the prohibition of Section 1(b) was emasculated and destroyed since all of the pipe and casing in the hole and all other facilities used to drill and equip the well were then subject to certification and control by the Commission, because they were equally essential to effectuate sale as the Court viewed the interpretation of "production" or "production facilities" in terms of ordinary non-industry connotation. The Congressional purpose would be preserved and accomplished by application of the time honored rule of construing words in the terms of the business and industry to be regulated.

REASONS FOR GRANTING THE WRIT

This is the first case in which this Court has been called upon to consider whether Section 7(c) of the Natural Gas Act requires that a certificate of public convenience and necessity authorizing a sale subject to the jurisdiction of the Commission cannot be issued unless a physical facility also be certificated; and further whether such Section authorizes an invasion of the prohibited area of jurisdiction defined in Section 1(b) of the Act to supply the facility to certificate.

The rationale of the decision is that any facility which aids or promotes effectuation of sale is a sale facility requiring certification. This destroys the provisions of Section 1(b) prohibiting jurisdiction over production and gather-

ing, and the Commission thereby is granted full and unrestricted jurisdiction over every phase and incident of the activity of drilling and gathering. For all materials and equipment necessary to drill and complete a well can, in this view, be said to aid or promote effectuation of sale which cannot occur unless gas is successfully produced. The producer is, thus, deprived of the right to drill and equip as his judgment dictates. He is thrown between Scylla and Charybdis. On one hand, he would obey, at his peril, state regulations governing every step in drilling, equipping, operating and producing gas wells. On the other, he would be compelled at pain of harsh penalties to secure the express approval of the Federal Power Commission for each one of the identical activities. Not only is the Federal Power Commission not equipped or competent to so manipulate every such act of every producer, but exercise of power so to do would smother the producer in such fashion as substantially to interfere with drilling and to diminish the expectancy of consumers to gas supplies. If the decision below stands, Congress labored in vain in the enactment of the exclusionary provision of Section 1(b); and this Court's decisions which have jealously enforced and protected the integrity and vitality of Section 1(b) will have been reduced to nonsense.

The decision below, thus, squarely presents broad and highly important questions affecting the jurisdiction of the Commission, particularly within the prohibited area of Section 1(b). Petitioner accordingly submits that the Court of Appeals has decided important questions of Federal Law which have not been but should be settled by this Court, and has decided them in a way which will have such extreme effect on the administration of a vital Federal statute as to call for review by this Court.

The Court of Appeals has decided erroneously an issue of general importance which this Court has not settled, but should determine, in holding that Section 7(c) of the Natural Gas Act permits issuance of a certificate of public convenience and necessity authorizing a sale subject to its jurisdiction only when facilities therefor exist and are certificated at the same time, and that to accomplish such purpose such section authorizes certification of production facilities, notwithstandng Section 1(b).

The Misconception of Section 7(c). It is apparent the Court misconceived Section 7(c). It fell prisoner to the fallacy posed by the Commission that a sale could not be made without facilities of the producer, that since Section 7(c) required certification of the sale, it also authorized invasion of Section 1(b) to certificate an admitted production facility on the specious ground that any facility which aided "possession" or "control" or "containment" of gas made possible the sale. Escape from Section 1(b) is not won by judicial fiat declaring a facility of production to be one of sale only.

Section 7(c) is couched in the disjunctive. It prohibits a natural gas company from doing four things unless it has a certificate therefor:

> (1) Making a sale subject to Commission jurisdiction;
>
> (2) Constructing or extending any *facility for a sale* subject to Commission jurisdiction;
>
> (3) Acquiring any *facilities for a sale* subject to Commission jurisdiction;
>
> (4) Operating any *facilities* or extensions *for a sale* subject to Commission jurisdiction.

This language nowhere commands conjunction of sale with facility for sale. It prohibits a sale without a certifi-

cate. If the producer constructs, or acquires, or extends, or operates a facility for sale, then and only then must he have a certificate therefor.

Unquestionably what the public interest demanded and Congress intended was to delegate to the Commission power to control the price of a wholesale sale. Control of "sale" furnished control of "price". Price control of a well-head sale is neither assisted or hindered by the presence, or absence of facilities for sale. Facilities for sale owned and operated by the producer were brought under regulatory scrutiny, primarily to assist the convenience of regulation. There is nothing in the commercial world, in common sense, or in the language of the Act which requires erection of artificially contrived theories such as the Court advanced to establish a separate "sales facility" where there is none, or justifies the use of this contrivance as a spring board to vault regulatory control into "the forbidden area" of production facilities.

Statutory Words Reflect Meaning Understood in Industry Regulated. The Court went further astray in its effort to assimilate "possession" and "containment" with "sale". Indeed, it comes close to assimilating "production" to "sale".

If "production" be separated from the meaning in which Congress obviously intended to use it, the Court's "conceptual anomaly" does not go far enough. For "physically" and apart from industry usage, any effective escape from the reservoir in which nature imprisons gas constitutes production. Thus, when that reservoir is punctured, the gas, like air in a punctured automobile tire, rushes to the puncture point of low pressure. Its escape from that reservoir in this aspect is production.

The Court really means control. Control is as essential to production as to sale, for uncontrolled gas cannot be pro-

duced, nor delivered to any purchaser. Congress, writing Section 1(b), was familiar with this.

The Court ignored the fact that Congress, in passing the Act, used the terms "production", "sale", and other similar terms of industrial art in the same sense and context as the industry employed them. *Order of Railway Conductors* v. *Swan* (1947) 329 U.S. 520, 525; *O'Hara* v. *Luckenbach S.S. Co.* (1926) 269 U.S. 364, 370-1; *New Mexico* v. *United States Trust Company* (1898) 172 U.S. 171, 181; *Hoffman* v. *Palmer* (1942, 2 Cir.) 129 F. 2d 976, 984; affirmed 318 U.S. 109; *R. H. Johnson & Co.* v. *Securities & Exchange Commission* (1952, 2 Cir.) 198 F. 2d 690, 696, cert. den. 344 U.S. 855.

The industry considers gas to be produced when it passes beyond the christmas tree (R. 112-3). The Court should have respected this, and ruled accordingly.

The Warping of Production Facilities to Unnatural Use. Thus the Court was wrong in adopting the reasoning of the Commission that any equipment which permits production may also permit effectuation of a sale. As the dissent so graphically points out, this concept embraces everything from the surface to the producing horizon, the producing horizon itself, and the lease covering it, and hence would absorb into 7(c) the producing business in its entirety. This forces production facilities into an unnatural use.

Such a misconception creates no authority to exercise power not granted by the basic statute, but indeed denied by the express terms of Section 1(b). Section 7(c) must be so interpreted as reasonably to accommodate the clear and undoubted policy of Congress to steer clear of the functions and physical properti of production. Congress left them to local authority.

The Commission's position seems strange, for in its brief Amicus in *Cities Service Gas Company* v. *State Cor-*

poration Commission of Kansas (No. 83, October Term, 1957) it seemed to have learned the lesson of *Panhandle* (337 U.S. 498), saying:

> "Moreover, they [sales] are not exempted from regulation by the 'production or gathering' exception of Section 1(b) of the Act; this language refers only to physical facilities, properties and activities underlying the sales and does not affect the jurisdiction of the Power Commission over the sales themselves." (p. 17).

Panhandle Furnishes Guideposts Here. In truth, the Court had guideposts available which it should have followed. In our submission, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company* (1949) 337 U.S. 498, lighted the way. Involved was freedom to convey leases which this Court termed "facilities of production." Equally so is the christmas tree here. *Panhandle* preserved intact the exclusions of Section 1(b). It (p. 503-5) is stony ground to the easy conclusion that these admitted production facilities are also sales facilities because they aid sale.

The claim that Section 7(c) grants power to swallow forbidden jurisdiction also is discredited. There (337 U.S. at 505) the Commission contended that 7(c), inter alia, showed Congressional intent "to confer a certain measure of authority upon the Commission over the production and gathering of gas." Emphatically the Court declared such section did "not even by implication" suggest regulatory extension "to cover incidents connected with production or gathering * * *" (p. 506). It concluded:

> "To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption

> of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both houses of Congress. The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states." (p. 509).

But the Court turned its back on *Panhandle* and instead declared its holding to be consistent with *Saturn Oil & Gas Co.* v. *Federal Power Commission* (1957, 10 Cir.) 250 F. 2d 61, cert. den. 355 U.S. 956, and *Huber Corp.* v. *Federal Power Commission* (1956, 3 Cir.) 236 F. 2d 550, cert. den. 352 U.S. 971. We find this reliance as difficult to understand as the refusal to obey and follow the mandate of *Panhandle*. Neither decision supports the Court's position.

In *Saturn*, the Court stated the basic question presented was whether wellhead *sales* were jurisdictional under the Act. (250 F. 2d at 64).

On "facilities" the Court declared: "The record does not disclose any controversey as to whether any particular facility is within or without the jurisdiction of the Commission" (Ibid. p. 69). That sets *Saturn* completely apart from this case. The Court's discussion of Saturn's Fifth Amendment contention claimed to arise from failure specifically to identify jurisdictional facilities does not succor absence of issue of jurisdiction on which this case pivots.

Nor is *Huber* apposite. Huber owned and operated an extensive gathering system comprising approximately eight miles of pipeline, to which eleven wells were connected. Gathering was consummated at a central point at which Huber installed and operated a system of three block valves located in a gate valve box with downstream pipe lines, two to three feet long, through a third valve, to the purchaser's pipeline. (Opinion of Presiding Examiner, In the Matters of J. M. Huber Corporation, Docket Numbers G-3038 and

(R. 557). The Examiner found on the evidence that these three block-valves and pipelines down stream were installed and operated by Huber for the purpose of making the sale and moving the gas into Northern's facilities. Thereby Huber retained "absolute control of the volume of gas which moves to Northern" (Idem p. 15). The Court concurred (236 F. 2d at 552). Huber's facilities clearly were "sales" facilities.

The Court's effort to assimilate this case to *Huber* and *Saturn* fails; its reliance on them is misplaced and misconceived.

Uncontradicted Evidence Conclusive. The facts of *Saturn* and *Huber* present strong contrasts from those here. Here the uncontradicted evidence establishes Continental's christmas tree is solely and only a facility for production, and does not and cannot constitute a facility for sale. In such circumstances the Commission was not free to ignore such testimony. It should have heeded the declaration of the Examiner that such uncontradicted evidence was conclusive. Strangely enough, the Fifth Circuit has twice declared in ringing language that administrative agencies must honor uncontradicted evidence. *National Labor Relations Board* v. *Russell Mfg. Co.* (1951, 5 Cir.) 191 F. 2d 358, 360; *National Labor Relations Board* v. *Ray Smith Transport Co.* (1951, 5 Cir.) 193 F. 2d 142, 146; see, *International Shoe Co.* v. *Federal Trade Commission* (1930) 280 U.S. 291, 299.

The dissent aptly points out that failure of the Staff, being possessed of experts familiar with the issues here involved, to offer evidence in contradiction of that of Continental can only be construed as admission of correctness of such evidence.

No Judicial Power for Independent Finding. But the Court was equally without authority to make the finding

and holding it did. Section 19(b) of the Act gives the Court no authority save a review "limited to keeping the Commission within the bounds which Congress has created". *Colorado Interstate Gas Company* v. *Federal Power Commission* (1945) 324 U.S. 581, 589.

Thus the Court was without authority to make a finding as the cornerstone of its affirmance because thereby it exercised the Commission's powers and substituted its own judgment for the administrative decision, given exclusively to the Commission. *Federal Power Commission* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 617-8; *Federal Power Commission* v. *Natural Gas Pipe Line Co.* (1942) 315 U.S. 575, 586; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246, 251-2.

This Court has decreed want of judicial power to consider issues, sua sponte, outside the scope of the motions and orders specified in Section 19 of the Act. *Federal Power Commission* v. *Colorado Interstate Gas Co.* (1955) 348 U.S. 492.

THE HOLDING BELOW PREVENTS COMPLIANCE WITH LOCAL REGULATION AND SUBJECTS PRODUCERS TO EXTREME PENALTIES.

The Court's discussion (App. 5a-6a) far from supporting its adjudication, sua sponte, that the top valve of the christmas tree is solely a sales facility, demonstrates to the contrary. It recognizes that both valves are essential production facilities installed as a safety measure to insure against blowouts and loss of control of the well, with consequent destruction of production. This is precisely what the uncontradicted evidence discloses (R. 13).

If the holding below stands, it will be disruptive of the oil and gas industry, and particularly of the right and freedom to drill wells. Indeed, producers will be presented with

Hobson's choice between strict state regulation designed to protect its natural resources and promote conservation, and tight federal regulation under the Act which will embrace the same activities.

Independent producers must be free to comply with obligatory local rules and regulations of conservation. The states, too, provide penalties for disobedience. Producers must not be hampered in taking such action as their experience, or the particular developing circumstances in connection with each well may urgently require. The problems and emergencies constantly arising during drilling and operation cannot, indeed, in nature will not, wait upon the ponderous, slow procedures of the Commission.

Yet, if the Commission be empowered to invade Section 1(b) and certificate production facilities upon the deceitful ground that they constitute sales facilities, Section 7(b) would prohibit the discontinuance of their use unless first authorized by the Commission. This would expose the producer to the overwhelming and harsh penalties of the Act with dire consequences both to the producer and the Act. *Ex parte Young* (1907) 209 U.S. 123.

The producer derives no reassurance from Section 21 language of "wilfully and knowingly", for if the radical and destructive policy of the decision below which splinters the barricade of Section 1(b) becomes the policy of the law, no action thereafter can be taken by the producer which will not be "wilfull and knowing". Nor can the Commission administer tranquilizers based upon declared intention, for if the decision below becomes the law, the Commission is obligated at all events to enforce it. It has not shirked seeking enforcement as *Panhandle* and *Huber* reflect.

CONCLUSION

We respectfully submit that this Court, as in *Panhandle*, should repulse the Commission's attempted raid into Section 1(b), undertaken to destroy and debilitate it in order to broaden and extend regulatory control and jurisdiction into the forbidden area. The answer bluntly proclaimed in *Connecticut Light and Power Co. v. Federal Power Commission* (1945) 324 U.S. 515, 528-9[*] needs repeating here:

> "it is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction'. The command 'thou shalt not' is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense" (p. 528-29).

Permitting the rule of the decision below to stand will foster an accumulation of administrative precedent which inevitably will provoke invocation of the familiar principle that continued administrative interpretation is entitled to serious and persuasive weight before the courts.

Continental agrees, and has admitted, that a certificate of public convenience and necessity properly should issue by the Commission covering its sale in this instance to El Paso because such *sale* is subject to the Commission's jurisdiction. Continental is equally convinced that the Commission has no jurisdiction over its production facilities and should not be allowed to beat down the prohibition of Section 1(b) thereby to assume jurisdiction over a production facility which the Act expressly provides it shall not exercise. Con-

[*] This decision expressly disapproved the holding of *Hartford Electric Light Co. v. Federal Power Commission* (see FN 5, p. 4, infra) relied on by the Commission and referred to in footnote 4 (App. 5a) of the Court's opinion below.

gress was explicit in excluding from Commission jurisdiction regulatory control over the facilities and incidents of production. Petitioner believes this Court should as emphatically preserve that Congressional intent by reversing the decision below which otherwise will allow the Commission to assume full jurisdiction over the whole spectrum of production.

Accordingly, it is urged that a writ of certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

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July 10, 1959

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 203

CONTINENTAL OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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In The

United States Court of Appeals

For The Fifth Circuit

No. 17016

CONTINENTAL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

(April 17, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: Continental Oil Company is a natural gas company within the meaning of the Natural Gas Act. It sells the gas produced from a single dry gas well in Lea County, New Mexico, to El Paso Natural Gas Company. In its brief, Continental asserts: "Sale of the gas takes place in the well head. Delivery occurs at the point where the facilities owned by Continental end and the facilities owned by El Paso begin; that is, at the point where the gas enters the 4-inch by 2-inch reducing swage [owned by El Paso] where it is screwed inside the 4-inch master valve [owned by Continental]." Before it reaches this critical delivery point the stream of gas has moved up through the

casing and through two master valves, either of which has the potentiality to shut off completely the flow of gas, but neither of which is designed or suitable to regulate the flow, i.e., increase or decrease it. The top member of the upper master valve is a threaded 4-inch aperture into which El Paso's reducing swage is screwed. This is the point of delivery of the gas to the purchaser, as described by petitioner above. The stream thereafter flows through a T and then through pipes, generally horizontally, to El Paso's meter and valve which controls the flow from the well.

Continental finished drilling the well and constructed part of the "Christmas tree," that is, the flanges and two master valves, and then, by closing the valves, shut off the stream of gas until after the sales contract was made with El Paso some six months later. Thereupon El Paso inserted the reducing swage and attached the T connection above it; the horizontal pipes were connected; Continental's master valves were opened and the flow began, subject thereafter to be regulated by El Paso by the opening and closing of its valves downstream from the above described equipment.

The question here is whether the Federal Power Commission was authorized to find that any of the "facilities" of Continental were subject to its jurisdiction. The question came up by petitioner's filing an application under protest for a certificate of public convenience and necessity accompanied by a petition for a declaratory disclaimer of jurisdiction, followed by an order of the Commission issuing the certificate as to the sale of the gas and also a certificate as to "such portions of the 'Christmas tree' that are owned by Continental and serve to contain the gas at the point of delivery," stating that such facilities "are facilities for effecting the sale of gas in interstate commerce."

In addition to requiring a certificate authorizing the sale of gas by natural gas companies, the Natural Gas Act requires in Section 7(c) a certificate authorizing the construction or extension, acquisition or operation of "any facilities" for the sale of natural gas, subject to the jurisdiction of the commission.[1]

Petitioner based its application for disclaimer on the contention that it has no facilities for sale of natural gas, but if it has they are also facilities of production, and that if any facilities for the sale of gas are also facilities used in the "production or gathering" of the gas the commission could not acquire jurisdiction over them because of the specific exemption of Section 1(b)[2] which provides that, "The provisions of this act shall . . . not apply to . . . the local distribution of natural gas or the facilities used for such distribution *or to the production or gathering of natural gas.*" (Emphasis added.) Although not specifically so providing, the language of this exemption

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[1] Section 7(c) provides as follows:

"(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations; . . ."

[2] This section provides:

"(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

has, as to other types of facilities, been held to cover facilities of production or gathering. See *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 504-505. See also *Deep South Oil Company of Texas* v. *Federal Power Commission*, 5 Cir., 247 F. 2d 882, 889.

The Commission says that there are facilities here utilized by Continental that are not facilities of production and, alternatively, that even though all facilities of Continental are used for production, nevertheless if they are also essential to effect the jurisdictional sales, such facilities are not within the exemption of Section 1(b). Neither gathering nor facilities for gathering are in issue here; only facilities for production.

We think a strong argument can be made under the alternative proposition in light of the holding by the Supreme Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and the decision of this Court in *Deep South Oil Company of Texas* v. *Federal Power Commission*, *supra*. There it was held that the affirmative grant of jurisdiction in Section 1(b) of the Act over interstate sales was not whittled down by the exemption of production and gathering even though it is apparent in those cases that what was there involved was what was considered in the industry to be a part of the gathering operation. It might reasonably be contended that by parallel reasoning the affirmative grant in Section 1(a), coupled with the positive language of Section 7(c) requiring that a certificate be required as to facilities for the sale of gas can no more be nullified by the exemption of production and gathering (which does not expressly include facilities for production and gathering)[1]

[1] As has been pointed out above, in cases not touching on the precise point there in issue, the courts have held that the exemption language comprehends facilities.

than can the grant of jurisdiction over the sales themselves be nullified by the exemption of production and gathering where the sales are made before production and gathering are completed.[4]

We think, however, that we need not place our decision on this alternative ground. We think, notwithstanding the claimed effect of the expert testimony to the contrary, this record discloses that there are facilities for the sale of the gas that are not facilities of production.

It is not only not disputed by petitioner, but is affirmatively argued by it that the sale of gas is completed in the well head and delivery is made at the point where El Paso's facilities receive it from Continental. It is also undisputed that the gas at the point of sale and delivery is the identical stream of gas that rises in the casing and passes through the first of the two master valves. The lower, or first of the two valves, is designed for the purpose of shutting off the flow unless and until the gas can be utilized. The upper or second valve is mechanically unnecessary to permit this operation. It is part of a normal installation clearly called for by the standard art in the industry to give flexibility in case repairs are needed or there is a failure of the single valve. In the ordinary language of purchase and sale of a product where it is in deliverable form the stream of gas is, in a sense, "produced" at the latest after it has passed through the first master

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[4] For a discussion of the treatment of a legal act, see Hartford Electric Light Co. v. F.P.C., 2 Cir., 131 F. 2d 953. In the Deep South case we quoted with approval from Interstate Natural Gas Co. v. F.P.C., 5 Cir., 156 F. 2d 949, 951:

> "[The act] is very simply and plainly written. After stating what it shall apply to, it then states what it shall not apply to. Under familiar rules of construction, a negation in or exception to a statute will be construed so as to avoid nullifying or restricting its apparent principal purpose and the positive provisions made to carry them out."

valve. Even including this valve as a facility of production may be argued to be conceptually an anomaly because, physically, production and delivery can be accomplished without any valves at all. We fully recognize that for safety of *operation*, making adequate provision for repairs, etc., the unbroken custom in the industry is to contain the gas by a complex of two valves and associated equipment. This is, of course, also required by the self interest of the producer not to let the gas waste and also by the conversation and regulatory policies of the state; but this does not change the fact that in the *ordinary sense of the terms* production of the gas has been completed at or just above the surface of the ground where it is physically deliverable but then is shut in until delivery commences. But under this contract the sale is not completed then, but is completed by delivery to El Paso at the upper threaded orifice or aperture of the second or upper valve which receives the threaded swage of El Paso. Thus, we need not consider whether the first or lower valve is a facility of production, because it is not contended by the Commission that it is also a facility for the jurisdictional sale. It may therefore be conceded that it is, for the purpose of this case, an exempt facility.

Petitioner contends that the only evidence in the record demands the finding as of a fact that the upper valve is also a facility of production.[5] We think it is fundamental

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[5] The evidence on this point consisted of testimony given on behalf of petitioner by Louis W. Miller as follows:

"Q. Mr. Miller, you state that you have been in the oil and gas business for eight or nine years. Will you state whether or not you are familiar with the meaning of the terms 'produced' and 'production' as such terms are used in the oil and gas industry?

A. Yes, I am.

Q. Will you state the source of your knowledge of the meaning of such terms?

that the construction of the statute cannot be made to depend on such testimony, but rather on the basic facts in the record. These facts, undisputed as they are, we think require the conclusion that, so far as germane to the inquiry here, production, as the term is used in this statute, was complete at or before the passage of the gas through the upper aperture of the upper valve. Our duty here is not to determine what is generally understood in the industry, in the resolution of other relationships, as meant by "production." It is to determine what Congress meant by the term. In making such determination we are faced primarily with the unambiguous and clear intent as construed by the Supreme Court in the Phillips case to regulate these interstate sales. Since it is in line with ordinary nontechnical usage, we must give to the terms the meaning that will effectuate and not the one that would frustrate the purpose of the law.

Petitioner contends that the order of the Commission implies that if delivery were made even further upstream, say at a point at the bottom of the well, the commission would have the power to certificate the facilities thus used to effect delivery. We say that if a producer sought to test

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A. I have heard them used many times in the field and in the bus , and I have talked with many old-timers who have been in the business for years longer than I have.

Q. Do you know whether the meaning of these terms as used in the oil and gas industry has changed in the last twenty years?

A. From my discussions with the old timers and from the way in which they use such terms, I am certain that the meaning has not changed in that period as such terms are used in the oil and gas industry.

Q. As such terms are used in the oil and gas industry, will you state when gas has been produced or when the production of gas is completed in an operation similar to that which you have described for the Stevens B-7 Unit No. 1 Well?

A. As the terms are used in the industry, the stream certainly is not produced and the production of the stream is not completed until after the stream has passed out of the Christmas tree."

out such such a theory it might then be necessary to determine whether the commission's alternative theory discussed above is valid. Here, in any event, the producer could certainly eliminate any uncertainty which it says exists as to what is meant by the Commission's terminology "such portions of the 'Christmas Tree' that are owned by Continental and serve to contain the gas at the point of delivery" if it should see fit merely to insert a length of pipe of as much as two or three inches to serve as a connector between its upper valve and the reducing swage owned by El Paso. It is little short of fantastic to consider the possibility that the jurisdiction of the Commission over facilities for sale, in light of the importance of such jurisdiction under the right of a natural gas company to terminate its services under Section 7(b),[6] could be made to depend on whether El Paso's swage screws into the top of the upper valve or into a short length of pipe which is owned by Continental and which is screwed into the valve.

What we hold here, consistent with the decision of the Courts of Appeals for the 10th Circuit and the 3rd Circuit in *Saturn Oil Gas Co.* v. *F.P.C.*, 10 Cir., 250 F. 2d 61, and *J. M. Huber Corp.* v. *F.P.C.*, 3 Cir., 236 F. 2d 550, is that the petitioner uses facilities for sale of the gas in commerce to El Paso which are not facilities in production of the gas and that the Commission's order relating to the granting of the certificate must be AFFIRMED.

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[6] The importance of commission jurisdiction of facilities in connection with the right to terminate service, is seen by reference to Section 7 (b) of the Act, which provides as follows:

"(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained; after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

BROWN, Circuit Judge, dissenting:

In my judgment the Court by this opinion engages in impermissible fact finding for which it has neither statutory warrant nor technical competence. It interprets the Natural Gas Act in terms of what it conceives is necessary effectually to enforce what it deems to be the policy of the law. In doing so it ignores the plain words of Congressional limitation on the basic power of the Federal Power Commission. Worse, it reads out of the Act both these words and the equally emphatic technical meaning ascribed to them not less than three times by the Supreme Court. Apparently from the demands of administrative necessity it reads the word "production" of natural gas as entirely removed from the technical context of the oil and gas business, as though Congress were using it in the colloquial or everyday sense concerning the production of wheat, or corn, or cattle or shirts. Finally, it seems to me to say that since, in the determination of jurisdictional sales, *Phillips Petroleum Company* v. *Wisconsin*, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035, is thought by many to have ridden roughshod over the same exemption, everything fell before that awesome decision even though the subject of our case is not *sales*, but *production* which is the essence and the exact subject of the exclusion.

The law may be imperfect. What Congress has prescribed may be something less than completely effective. But when Congress has spoken in terms of the strongest prohibition that "the provisions of this act * * * shall not apply * * * to the production * * * of natural gas," it is our duty faithfully to apply this exclusion. It is not our province either to ignore these positive terms or gloss over them with some easy construction under any

supposed duty that "we must give to the terms the meaning that will effectuate and not the one that would frustrate the purpose of the law." That purpose is described in the opinion as "the intent * * * to regulate * * * interstate sales."—a statement which is, to say the least, an oversimplification since that purpose is in the very same sentence[1] of the Act which imposes this positive prohibition.

I.

The Court seems preoccupied with the omission of the term "facilities" from the production of natural gas exclusion of Section 1(b). It twice points out that in contrast to the immediately preceding phrase "or to the local distribution of natural gas or to the facility used for such distribution," reference is made to facilities whereas this language is absent in the phrase applicable here, "or to the production or gathering of natural gas." The Court acknowledges, as it must, that this language of the exclusion has been construed expressly to cover *facilities* of production or gathering.[2] But this innocuous and casual presenta-

[1] Section 1(b) provides:

"(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 USCA 717(b).

[2] The Court's opinion states: "Although not specifically so providing, the language of this exemption has, as to other types of facilities, been held to cover facilities of production or gathering. See Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U.S. 498, 504-505. See also Deep South Oil Company of Texas v. Federal Power Commission, 5 Cir., 247 F. 2d 882, 889." And see the parenthetical phrase "(which does not expressly include facilities for production and exemption)" at note call 3.

tion creates the impression that these interpretative decisions, both on the meaning of the term and its general purpose, are of remote and only indirect interest. I do not think they either may or ought to be so quickly dismissed by this deferential curtsy.

I think these interpretative decisions are of critical importance. A brief consideration of them is convincing that the Supreme Court regards the words of the §1(b) exemption as much a part of the Act as the affirmative grant of power.

That "production" included the facilities reasonably required for it has long been settled through the emphatic language of *FPC* v. *Panhandle Eastern Pipe Line Company*, 1949, 337 U.S. 498, 504-55, ... S. Ct. ....., 93 L.Ed. 1499:

> "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act. In support of this position it is pointed out that the section specifically exempts both the local distribution and the facilities used therefor while it makes no mention of the facilities used for production or gathering. In the face of the unambiguous language of the Act and its legislative background, we cannot ascribe such a narrow meaning to the words, 'the production or gathering of natural gas.' In Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 603, 65 S.Ct. 829, 839, 89 L.Ed. 1206, we said that this phrase comprehended producing properties and gathering facilities of a natural-gas company. We now adhere to this natural and clear meaning of the words and their obvious expression of congressional intent."

This Court's off-hand suggestion that a "strong argument can be made under the alternative proposition in light of the holding by the Supreme Court in *Phillips Petroleum Company v. Wisconsin*" assumes that since the Supreme Court found *sales* not affected by the §1(b) exclusion so that "production" was swallowed up by anything amounting to an "interstate sale" hardly finds support in anything which the Court there said.

> "In Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 505, 69 S.Ct. 1251, 1256, 93 L.Ed. 1499, 1506, we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the producing properties and gathering facilities of a natural-gas company.' Similarly, in Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 598, 65 S.Ct. 829, 837, 89 L.Ed. 1206, 1220, we stated that '[t]ransportation and sale do not include production or gathering,' and indicated that the 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas. Id., 324 U.S. at pages 602-603, 65 S.Ct. at page 839. See also Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 612-615, 64 S.Ct. 281, 292-294, 88 L.Ed. 333, 350-52; Peoples Natural Gas Co. v. Federal Power Commission, 75 U.S. App. D.C. 235, 127 F. 2d 153; cf. United States v. Public Utilities Commission, 345 U.S. 295, 307-311, 73 S.Ct. 706, 713-716, 97 L.Ed. 1020." *Phillips Petroleum Company v. Wisconsin*, 1954, 347 U.S. 672, 678, 74 S.Ct. 794, 98 L.Ed. 1035.

More important, the Court has always regarded the exclusions in §1(b) as absolute prohibitions on basic power in order to effectuate a Congressional purpose not only to cover some areas, but, just as positively, not to cover or intrude upon others:

"Without entering upon another review of its legislative history, suffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies. Accordingly, Congress in §1(b) of the Act not only prescribed the intended reach of the Commissioner's power, but also specified the areas into which this power was not to extend.

"' • • • [quoting §1(b)]

"'This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.' Panhandle Eastern Pipe Line Co. v. Public Service Commission, 332 U.S. 507, 516, 68 S.Ct. 190, 195, 92 L.Ed. 128, 137. The Act, moreover, expressly exempts from its coverage (1) any other transportation or sale of natural gas; (2) the local distribution of natural gas; (3) the facilities used for local distribution, and (4) the production and gathering of natural gas." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 502-504, 69 S.Ct. 1251, 93 L.Ed. 1499.

This but echoed the earlier statements in *Interstate Natural Gas Company v. FPC*, 1947, 331 U.S. 682, 690, 67 S.Ct. 1482, 91 L.Ed. 1742, 1748:[3]

> "Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters."

The last part of §1(b) is as important as the first. The tail is as important as the head. While the purpose was to regulate interstate transportation and interstate sales of gas, the policy was equally firm that the Commission was to have no power whatsoever over production or gathering of natural gas. The one is as much the Congressional purpose as the other. Congress may act in both an affirmative and negative way. What it means not to cover or invade is frequently as significant as the limited field it undertakes to enter. *Libby, McNeill & Libby v. Mitchell*, 5 Cir., 1958, 256 F. 2d 832, 834; *Maneja v. Waialua Agricultural Co.*,

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[3] This Court in that same case, 5 Cir., 1946, 156 F. 2d 949, 951, had earlier stated about §1(b) and the Act:

"Unnecessarily perhaps but in the interest of making clear that the act gave jurisdiction only over sales and transportation of the kind described in it, it used language removing from any doubt that the Commission was not to have jurisdiction over properties used for production and local distribution or the activities of production and gathering. It did this by expressly providing that the act should not apply 'to the facilities used for such [i.e. local] distribution or to the production or gathering of natural gas.'"

Just a year ago in the context of well-head sales, we again voiced the meaning of the exclusion in terms of an absolute prohibition of power:

"The exemption of production and gathering merely means that the physical activities, facilities and properties used by petitioner in the production and gathering of natural gas are not within the commission's power of regulation." Deep South Oil Company of Texas v. FPC, 5 Cir., 1957, 247 F. 2d 882, 889.

1955, 349 U.S. 254, 260, 75 S.Ct. 719, 99 L.Ed. 1040; see also *ICC v. Dunn*, 5 Cir., 1948, 166 F. 2d 146; *ICC v. Krobbin*, N.D.Ia. 1953, 113 F. Supp. 599, aff'd 8 Cir., 1954, 212 F. 2d 555.

It matters not what happens to regulation, it matters not how some assumed policy will be thwarted or impeded. The simple truth is that the Commission cannot take any step, impose any requirement, or condition in any way any activity which is directly a part of the "production * * * of natural gas" or directly concerned with "facilities and properties used" in the production of natural gas.

II.

This Court undertakes to find that at the time of delivery under these sales by Continental to El Paso production had ended. This will be analyzed in Part III. In my judgment, for this Court to state, "We think * * * this record discloses that there are facilities for the sale of the gas that are not facilities of production" is to disregard the function of this Court in the review of actions by the Federal Power Commission.

We are not the Federal Power Commission. We are not equipped to be the Federal Power Commission and we have not been commissioned to be the Federal Power Commission. We are not to find facts respecting matters committed to the Federal Power Commission. "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." §19(b), 15 USCA §717r(b). We are to *review* the fact decisions within a limited area and then determine on such fact findings whether the Commission has fairly applied the law. That the opinion of this Court is an invasion of the fact-finding function of the Federal Power Commission and is the assertion of a right to substitute our judgment for that of the expert body is

demonstrated by what the Commission did and did not do in this proceeding below.

The Commission, in its original order[4] overruling the Examiner's contrary findings, after first disposing of the jurisdictional sales issue no longer in this case then turned "to the question of whether there are facilities involved here to be certificated." The premise upon which the Commission proceeded was almost immediately stated: "The Court in upholding our position has clearly shown that 'facilities' apply to those facilities which serve the function of effecting the sale. *J. M. Huber Corp.* v. *FPC*, 236 F. 2d 550, 556, cert. denied 352 U.S. 971." This was followed by an assertion which equated the problem with one of *sales* in total disregard of *production*.[5] Right on the heels of this was a reiteration of the basic approach. "In this regard, Section 7(c) in referring to 'facilities therefor' and 'such facilities' reasonably applies to those facilities which serve the function of effecting the interstate sale or interstate transportation as the case may be."

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[4] September 6, 1957, Docket No. G-6346.

[5] The report went on to state:

"Obviously in this case there is a facility called a 'Christmas tree' between the producing well and the point of delivery to El Paso. It is apparent that under the Act a line must be drawn between sales facilities which must be certificated under Section 7(c) and other facilities without which a sale could not be made but which are not sales facilities within the meaning of Section 7(c) and for the operation of which no certificate is required. Drawing such a line requires consideration of the provisions and objectives of Section 7, of appropriate means for the attainment of the objectives of this section, of the characteristics of the producing segment of the natural-gas industry, of the administrative practicalities involved, and of such other circumstances as may exist in a given case."

As can be seen, Section 1(b) was not even given the barest mention.

The climax of the Commission's order was then immediately reached in terms which disregarded altogether the idea of *production*: "Applying these principles to the particular facts of Continental's operations, it is apparent that such portions of the 'Christmas tree' that are owned by Continental and serve to contain the gas at the point of delivery are facilities for effecting the sale of gas in interstate commerce, *regardless whether they serve also to effect production.* * * * 'Agere sequitur esse' says the logic primer: What a thing is is determined by what it does. It cannot reasonably be contended that the sale in this instance can be effectuated without the aid of Continental's facilities herein involved."[6] (emphasis supplied)

Despite vigorous well-organized exceptions which pinpointed the contentions advanced by Continental's petition for rehearing as required under Section 19(b), 15 USCA 717r(b), the extended order of the Commission denying application for rehearing is likewise noncommittal on the question of *production*. The Commission pointed out, respecting certification of facilities, that "these are the facilities, in the words of Section 7(c) of the act, which are for

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[6] In the formal findings section of the order, the Commission found: "2. The sale of natural gas hereinbefore described * * * is made in interstate commerce subject to the jurisdiction of the Commission, and such sale by Continental, *together with the operation of any facilities (which are included in the Christmas tree involved herein)* subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act." (emphasis supplied) In the formal order section the Commission ordered: "(A) A certificate of public convenience and necessity is hereby issued * * *, authorizing the sale by Continental of natural gas in interstate commerce for resale, together with the continued operation of *any facilities (which are included in the Christmas tree involved herein)*, subject to the jurisdiction of the Commission, *used for the sale* of natural gas in interstate commerce, as hereinbefore described * * *." (emphasis supplied)

the 'sale of natural gas, subject to the jurisdiction of the Commission.'" What were these facilities was then immediately identified in terms wholly apart from production. "The Commission has in this case, however, limited its certificate very narrowly to the most immediate facilities, part of the Christmas tree, owned by Continental, and serving to contain the gas at the point of delivery."

And, as the very last word of the Commission on this subject in this proceeding, it again makes clear that the Commission has not undertaken to determine when production has ended or whether production is still going on or where production ends. Consistent with its initial decision, it regards "facilities" as coextensive with the needs for delivery for sale wholly apart from considerations of production. All that "is material" the Commission states, "is that Continental owns facilities by means of which it possesses, delivers, and sells the gas and it is those facilities that are subject to this Commission's jurisdiction."[7]

So far as the Commission has determined, any and all equipment required "to contain the gas at the point of delivery" is a facility for such sale and subject to the Commission. It is entirely immaterial whether that equipment or appliance or its use is in *production* or whether when Continental *possesses* the gas, the process of possessing is simultaneously the process of production.

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[7] This quoted excerpt gains significance from its context.

"With respect to the Christmas tree Continental objects to our describing it in the original order as a facility between the producing well and the point of delivery, saying that the Christmas tree is part of the well. Whether the Christmas tree, in which delivery is made, is technically a part of the well is immaterial. The record clearly sets forth the physical facilities and the exact point of delivery. What is material is that Continental owns facilities by means of which it possesses, delivers and sells the gas and it is those facilities that are subject to this Commission's jurisdiction."

What the Commission does not find, this Court undertakes to do. This is beyond our statutory function.

III.

Finding an essential fact of this character is not only without statutory warrant. It is, with all deference to my Brothers who are articulate, conscientious and able juridical craftsmen, beyond the competence of us as Judges. This is at least so on this skimpy record which, apart from a photograph and the expert testimony the Court derides, note 5 of Court's opinion, as self-serving gossip, does not contain any evidence from which we, as non-technical men, could proceed to arrive at any such pronouncement of our own concerning the highly complicated field of gas engineering and production operations. Unless we have record facts or claim an omniscience which my modest Brothers would disavow, see Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. Law Review 751, I am at a loss to understand where the Court gets the wisdom or the experience or the information upon which to make this critical fact finding. Indeed, the statements are, in my view, not only bad law, they are bad engineering.

These deliverances find their climax in what I can only regard as surprising. After a supposititious concession that the lower, first, master valve might be used to "produce" the gas, the Court makes this remarkable statement. "Even including this valve as a facility of production may be argued to be conceptually an *anomaly* because, physically, production and delivery can be accomplished *without any valves at all*." (emphasis added) With deference to my distinguished colleagues, the anomaly, in my judgment, is that at this day and time such a statement would or could be made. Indeed, the statement is self-defeating for it is followed by one which affirms that in the practice of the

industry, Christmas tree valves are used as an essential step in production. The Court states, "We fully recognize that for safety of *operation*, making adequate provision for repairs, etc., the unbroken custom in the industry is to contain the gas by a complex of two valves and associated equipment."

With today's high pressure gas reservoirs from which the long line transmission pipe lines carry essential fuel to the metropolitan consumers across the land, I cannot conceive how a gas well could be brought in without valves. It could not be because the conservation authorities would not permit it.[8]

Even in the figure of speech used by the Commission that it is a question of reducing the gas to possession for sale, this is an essential part of the process of production. For gas is not produced unless it is effectively reduced to the control of the one undertaking to dispose of it. Every facility which Continental owns — this includes the Christmas tree to the top of the 4-inch valve — is essential to production. This is established by uncontradicted proof. The proof is not that set forth in note 5 of the Court's opinion. There the witness was undertaking merely to describe what the industry considered the term "production" to mean as it might bear on ascertaining the Congressional intent in the selection of that terminology. In describing the process of drilling the wells in this field, his answers are unchallenged. Considering that the Federal Power Commission has an abundant staff of outstanding experts in the field of gas engineering and production, the failure of the staff

[8] Although this was a New Mexico well, the rules of the Texas Railroad Commission are typical. See Rule 44, "A blowout-preventer control head and other connections for keeping the well under control at all times shall be installed as soon as surface casing is set." Rule 45, "All wells shall be equipped with a Bradenhead." Rule 48, "All wells shall be equipped with adequate chokes, or beans, to properly control the flow thereof."

counsel to offer any rebuttal seems almost decisive. This witness, a senior production engineer for Continental, a graduate engineer with nearly ten years' experience in the field with gas problems and gas operations in Texas and New Mexico, was positive that the Christmas tree comprising the two master valves was indispensable:

> "Q. What is the purpose of the two master valves?
> "A. The two master valves are necessary to the production of the gas. Both of these valves were installed when the well was completed in January of 1949. Their installation was a necessary part of the completion of the well * * *."

It was equally uncontradicted through him that this equipment was installed in all of Continental's wells numbering about fifty in that area. Here, of course, it was installed when the well was completed. The well was not completed until the Christmas tree was installed. This was six months before the sales contract was ever entered into.

When, even in our technical ignorance, we take into account that high pressures are involved in most modern gas wells, that conservation rules forbid the waste of gas into the atmosphere, that wells can be irretrievably damaged by improper or inadequate pressure controls during the critical stage of bringing them in, that lives would be needlessly exposed to serious hazards, it is plain to me that we cannot engage in fact findings of the kind undertaken by the Court here.[9]

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[9] I should emphasize here that what little information I may have absorbed in the midst of an oil and gas economy does not fit me to arrive at conclusions of which legal action may be based. This pinpoints the precise difference between me and my colleagues. They use their general knowledge to reach and declare a finding, i.e., non-production. From my resources I do not undertake to find the opposite. I conclude only that the record does not warrant their conclusion.

Indeed, I do not think that my cautious Brothers would have undertaken this excursion had they not first have found (or assumed) a basis for considering *production* in its ordinary, common usage. For clearly, what the Court says does not follow if the term is used in the sense of the oil and gas field. For example, the Court states, "In the ordinary language of purchase and sale of a product where it is in deliverable form the stream of gas is, in a sense, 'produced' at the latest after it has passed through the first master valve. * * *." Again, it states, "but this does not change the fact that in the *ordinary sense of the terms* production of the gas has been completed at or just above the surface of the ground where it is physically deliverable but then is shut in until delivery commences." * * *

To support this approach, the Court frankly states that "our duty here is not to determine what is generally understood in the industry, in the resolution of other relationships, is meant by 'production.'" It is, rather, the Court goes on to say "to determine what Congress meant by the term." Reading §1(b) as though it contained only the first part of the sentence and disregarding altogether the exclusionary phrases at its end, the Court then proceeds to find that the sole Congressional purpose was "to regulate these interstate sales." This causes the Court then to reject the industry context and adopt a construction of "production" which "is in line with ordinary non-technical usage" so that it will "effectuate and not * * * frustrate the purpose of the law."

But Congress was not legislating in an atmosphere of "ordinary non-technical usage." The abundant legislative history canvassed by the many Supreme Court cases reveals an articulate awareness of the complexities of this whole business. The object of §1(b) was clearly to define the purpose to regulate transportation and sale and com-

panies engaged in such transportation or sale. This was done against the background fully known to Congress that at one end of the process was the production of the natural gas, that at the other end was the consumer, and in between were those who transported and distributed it. As pointed out in Part I above, the Court has been emphatic in ascribing an intention to Congress to exclude those matters which relate to the local production activities traditionally reserved to states for their exclusive control.

We are told that 1(b) exclusion is a provision " * * * that * * * precludes the Commission from any control over the activity of producing or gathering natural gas. * * *.". *Colorado Interstate Gas Co. v. FPC*, 1945, 324 U.S. 581, 603, 65 S. Ct. 829, 89 L. Ed. 1206. Two years later this was reiterated in *Interstate Natural Gas Company* v. *FPC*, 1947, 331 U.S. 682, 690, ... S. Ct. ....., 91 L. Ed. 1742. "Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters."

Within another two years this was re-emphasized in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 509-13, ... S. Ct. ....., 93 L. Ed. 1499. "To accept these arguments springing from power to allow interstate service, fix rates and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress. The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states."

How Congress expected to preserve the absolute freedom of the States in matters concerning production unless that term was used in the context of that industry is nowhere made clear by my Brothers. If Congress were to adhere to its purpose, carefully to regulate some but not all of the natural gas moving or dedicated to move in interstate commerce, it was required to prescribe the boundary limits of each in terms of the business and industry to be regulated. That is the usual, not the extraordinary, principle of statutory construction long ago set forth in *Unwin* v. *Hanson*, [1891] 2 Q.B. 115, 119, approved in *O'Hara* v. *Luckenback Steamship Co.*, 1926, 269 U.S. 364, 370-371, 46 S. Ct. 157, 70 L. Ed. 313:

> "If the act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

And see 50 Am. Jur., Statutes 277 (1944).

What is "production of natural gas" is to be determined in the light of the actual substantive conditions and engineering-business requirements of that great field of scientific mechanical activity. Such activity is not to be assayed by Judges who, learned in the law, have naught but the limited technical experience and cumulative knowledge of the ordinary person.

Judged by the standards of the industry, not only by what was said and uncontradicted, but by what was done on a large scale in this very field, the Commission could only find that all of Continental's facilities were essential to and a part of the production of gas.

IV.

The Court's action and opinion is portentous. It is so precisely because it is based on an erroneous assumption and an equally erroneous construction. It assumes that we are fact finders to supplant or supplement the expert agency. It finds the capacity to cope with this problem by relieving it of all technical complexities and casting it in the mold of the ordinary meaning of *production*.

The Court finds "that in the *ordinary sense of the term* production of the gas has been completed at or just above the surface of the ground where it is physically deliverable * * *." (emphasis in the original) Tying this in to the point of delivery (at the very extreme end of Continental's 4-inch master valve and at the very beginning of El Paso's swage), the Court has necessarily adopted the approach of the Commission that facilities for the sale of natural gas subject to the jurisdiction of the Commission are those "serving to contain the gas at the point of delivery." That it means to champion this construction is likewise established by the Court's unqualified approval, both here and in *Sun Oil Company* v. *FPC*, 5 Cir., 1959, ...F. 2d ....., [No. 17040], this day decided, of *J. M. Huber Corp.* v. *FPC*, 3 Cir., 1956, 236 F. 2d 550, 556 and *Saturn Oil & Gas Co.* v. *FPC*, 10 Cir., 1957, 250 F. 2d 61, 69, the latter of which states: "To us it is clear that facilities necessary to effect a sale of gas in interstate commerce are facilities used in interstate commerce and are within the jurisdiction of the Commission. This would seem to be the plain intent of section 7(c). The Third Circuit has so held in *J. M. Huber Corp.* v. *Federal Power Commission*, 3 Cir., 236 F. 2d 550, 556."

The vice of this rationale is compounded by the Court's interpretation of "production" or "production facilities" in terms of ordinary non-industry connotation. But even

without this, if the test is to be stated in terms of that piece of equipment which is needed to effectuate the sale or contain the gas at the point of sale delivery, then there is in fact no physical limitation. In those terms the master valve (whether upper or lower, or both) does not alone contain the gas. The master valves are ineffective without the continuation of the leak-proof surface casing, the production casing or many other parts of the well, all of which operate simultaneously and indispensably to bring and hold the gas under effective control.

That is critical since §7(c) requires certification of facilities which are to be constructed or extended. And once a little intrusion is made into the forbidden 1(b) area of production, it is only logical to expect (and justify) application of the full reach of this concept. It stops in a given well where, but only where, the particular piece of equipment may be said to directly assist in the containment of the gas at delivery point. Worse, it means that by the force of §7(c), the drilling and equipping of a new well could only be done by express approval of the Commission.

We and all others have now firmly held that on the commencement of the first jurisdictional sale, the Commission's power attaches at least to the sale. The Court by our present opinion holds that simultaneously power attaches to *some* piece of gas well equipment. If the jurisdictional sale setting all of this Federal control in motion is in the common form of a long-term dedication-of-reserves-contract by which the mineral owner undertakes to develop a field and deliver all production to the long line pipe line purchaser, the result will be that the drilling of additional wells may not be done except on Commission terms and approval. In such a situation the "new" well would, of course, be the means by which to effectuate the sale of the gas. Since this would constitute "the construction or extension of any

facilities" for the sale of natural gas subject to the jurisdiction of the Commission, and would result in the acquisition and operation of "such *facilities* or extensions thereof," it would, as §7(c) demands, positively require that the Commission issue a certificate of public convenience and necessity "authorizing such acts or operation."

Combining this opinion and *Sun Oil*, this day decided, this Court binds a gas well owner to *produce* gas for as long as the Commission prescribes. Neither the length of the contract nor the production-nature of the facility by which the "service" (sale) is performed are an effective limitation. Until nature shuts off the gas the Commission is the perpetual regulator from whose power the Commission's own brief says, "• • • there is no • • • hiding place."

Congress did not mean to invest its creature with these scriptural powers (Psalms 139:7, 8). Section 1(b) draws the line at production.

I respectfully dissent.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1958

No. 17,016

CONTINENTAL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION SITTING AT WASHINGTON, D. C. (TEXAS CASE)

Before TUTTLE, JONES and BROWN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Continental Oil Company for review of an order of the Federal Power Commission issued on September 6, 1957, in Docket No. G-5346, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Federal Power Commission relating to the granting of the certificate in this cause be, and the same is hereby, affirmed.

"Brown, Circuit Judge, Dissenting."

April 17, 1959

FEDERAL POWER COMMISSION

NATURAL GAS ACT

Sec. 1(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. §717(b)]

Sec. 7(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. §717f(b)]

Sec. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,*

That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c).]

SEC. 19(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person,

State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act. [52 Stat. 831 (1938); 15 U.S.C. § 717 r (a).]

Sec. 19(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such

petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). [52 Stat. 831 (1938); 15 U.S.C. § 717 r (b)]

SEC. 21. (a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this act required to be done, or willfully

and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

SEC. 21(b). Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. [52 Stat. 833 (1938); 15 U.S.C. §717t]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

DECISION

In the Matter of
Continental Oil Company } Docket No. G-6246

UPON AN APPLICATION FOR A DISCLAIMER OF JURISDICTION, OR, IN THE ALTERNATIVE, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UNDER SECTION 7 OF THE NATURAL GAS ACT

Appearances

For Continental Oil Company

Roland B. Voight, Esq., Houston, Texas

For the Staff of Federal Power Commission

John Cosmic, Esq., Washington, D. C.

WOODALL, PRESIDING EXAMINER: Continental Oil Company (Continental) filed an application for a certificate of public convenience and necessity (involuntarily under protest) because of the Commission's Order No. 174-A, and prays the Commission to enter an order disclaiming jurisdiction of the sale herein involved and dismissing the application. If, however, Continental as to this sale requires a certificate of public convenience and necessity, the issuance thereof is sought herein to authorize the continued sale of gas pursuant to the terms and conditions of its contract with El Paso Natural Gas Company (El Paso).[1]

[1] The Applicant's Contract No. 4081, which governs the sale here involved is Exhibit No. 1 herein; which incorporates the terms of Exhibit No. 2.

ISSUE

The single issue herein is whether this transaction brings Continental as to this sale and as to the facilities owned by Continental within the jurisdictional requirements of the Natural Gas Act. If the Act creates jurisdiction in the Commission over this transaction and the facilities of this well owned by Continental, it is undisputed that a certificate of public convenience and necessity should be issued on the uncontroverted facts in evidence herein.[2]

CONTENTIONS

The Staff argues that the Commission has jurisdiction because the gas produced from this single well flows from the well through what is commonly known in the oil and gas industry as a "Christmas tree" and on into the gathering lines of El Paso and ultimately after commingling with gas from other wells in the same field is carried (after pressure increase) into one of El Paso's gasoline plants and finally the gas product of such plant crosses state lines. It is undisputed that El Paso transports gas in interstate commerce and that all or part of the product of this well travels across state lines in such commerce for resale by El Paso. "Clearly the sale is a sale by producer to interstate pipeline company for resale."[3]

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[2] The petition for declaratory order filed concurrently with Continental's application and given the same docket number raises the same issues as Continental's prayer for a disclaimer of jurisdiction.

[3] Staff's Brief, p. 4
This sentence summarizes the position that the producer (Continental) sells to El Paso, an interstate pipeline company, for resale, and hence, Continental is engaged in the interstate transportation and sale for resale.

Continental argues that the sale and delivery herein is completed at the point where the facilities owned by Continental end, that such point is before production has been completed (or could be accomplished) and at a point before gathering by El Paso in that field has even begun, and hence, is not a sale in interstate commerce. Such sale has been completed before the commencement of the interstate journey in El Paso's system. Continental also argues that none of the facilities owned by Continental at the well here involved are subject to the requirements of the Natural Gas Act that a certificate of public convenience and necessity must be obtained authorizing the construction and operation of such facilities; because the only facilities owned by Continental are production facilities.

THE UNDISPUTED FACTS OF EVIDENCE[4]

1. Only a single gas well (N. N. Stevens, B-7 Unit NW ¼ Sec. 7-T23S-R37E No. 1) and gas taken from it by El Paso are involved herein. Continental drilled the well and installed therein the casinghead and two master valves in January 1949, which facilities enabled the well to be shut in. Sale of the gas of the well takes place in the well-head. Delivery takes place at the point where the facilities owned by Continental end and the facilities owned by El Paso begin; namely: at the point where the gas enters the 4-inch by 2-inch reducing swage (owned by El Paso) at the top of the Christmas tree, where it is screwed into the 4-inch master valve (owned by Continental).[5]

[4] None of the evidence introduced by Continental was controverted. The Staff introduced no evidence and did not dispute any evidence of record. Hence, these undisputed facts are enumerated as necessary findings of fact being conclusive by reason of being the exclusive evidence of record.

[5] At this point it is clear that often one picture is worth a thousand words—as a Chinese adage suggests. Such a picture exists as Exhibit 3. The pipe and valves, etc., extending from

2. After entering the horizontal flow line from the tee, which connects the 2 x ½ inch swage and the ½ inch needle valve with the 4 x 2 inch reducing swage at the rate of flow determined by the valve manifold, as owned, operated and controlled by El Paso, the gas from the well travels as follows: Horizontally through the 2-inch pipe about 6 feet, then downward into the ground and again horizontally underground about 112 feet to El Paso's heater (required for the stream to flow through El Paso's meter and field gathering lines during the cold weather). From the heater the gas flows underground approximately 13 feet to El Paso's meter run. It then flows about 41 feet through the meter runs, which measures the volume and records the temperature. Again the gas travels underground and through El Paso's valve-manifold (T. 31-32). At El Paso's field compressor (after a flow underground of ½ mile) the gas becomes commingled with gas from several other wells. After pressure increase the gas enters the field gathering system and is processed in an extraction plant owned by El Paso, after which it enters El Paso's interstate transmission system. Some of the residue gas from the well here involved on information is believed to cross state lines. There is no proof of interstate transmission of the gas involved herein; but Continental on information and belief states that it believes some or all of this commingled gas stream crosses a state line in El Paso's main system.

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the ground upward at the well site to a height of about 6 feet and which are black in color, are owned by Continental — and, except for the pipe in the well below, Continental owns no other part of the equipment. The equipment which is painted black is referred to as the casing-head, a bleeder valve, two master valves and their connections. The facilities which are painted white were installed and are owned by El Paso pursuant to the contract. They are described as the two swages, the tee and the needle valve, which is on the very top of the Christmas tree, and about 12 feet of 2-inch pipe which runs first horizontally then vertically into the ground. All other equipment in the field is owned by El Paso. A more detailed engineering description appears at T. 23-31.

3. Continental[6] has no title or interest in the stream of gas or any of its contents after it passes from Continental's 4-inch master valve into El Paso's 4-inch by 2-inch reducing swage. El Paso pays Continental (and its associates) for a part of the gasoline and other products which El Paso extracts from the stream of gas at its plant.

4. Pursuant to the contract El Paso operates the well here involved and controls the volume of production from the well by the chokes in the valve manifold owned by El Paso. There is no other choke in the facilities. El Paso changes the meters and temperature charts and computes the volumes taken from the well. Continental has not manipulated either of the two master valves of the facilities owned by it since deliveries to El Paso commenced in June 1949 nor has Continental otherwise controlled the flow of gas from the well. By contract Continental has the right to require El Paso to operate the production of the well in accordance with the law of New Mexico and the regulations and orders of the Conservation Commission of that state and all other pertinent law and regulations. (T. 56, 57).

FINDINGS AND CONCLUSIONS

Upon consideration of the entire record and the briefs of the parties, it is further found and concluded:

(1) The well-owner is physically incapable of producing gas from the well here involved because the facilities owned by the well-owner are incapable of controlling the flow of the well. The bleeder valve permits the escape of gas that may collect between the surface casing and the well-casing in the event of

[6] Actually Continental only owns an 11/48th of the working interest in the well; but because it operates the lease for the interest of the other owners, it is the applicant herein and is referred to as though sole owner. (T. 22).

trouble. A master valve is not designed to control the volume of gas delivered or the rate of flow. It is operated either wholly closed, shutting in the well or wholly open. If operated partly open, the seats and cores tend to be rapidly cut out. (T. 28, 29). Therefore, Continental does not produce gas from the well here involved.

(2) By the contract now in force with El Paso as to this well, El Paso produces the gas from the well. By the contract Continental has sold gas in place in the well and in the casing of the well up to the meter valve owned by Continental. The gas sold by the contract was not gas in motion. The first movement of the gas occurred when El Paso installed the equipment found above to be owned by it under the contract and operated these facilities to allow the flow of the gas from the well at its well pressure at the rate determined by El Paso's valve manifold. The gas moves from the well only as El Paso operates equipment to control the production of the gas and its flow in El Paso's system facilities.

(3) The sale by Continental to El Paso here involved was not and is not a sale in interstate commerce.

(4) The facilities owned by Continental are not facilities for the sale or transportation of gas in interstate commerce. No provision of the Natural Gas Act requires Continental to apply for or obtain a certificate of public convenience and necessity authorizing the drilling of a gas well, the installation of the well-casing, the casing head, the bleeder valve, the master valves or any of the facilities owned by Continental as part of the well here involved. No case decided by any court, and no decision or order of this Commission has been cited or found that requires the certification of the sale or of the facilities here involved. Continental engages in no transportation of the gas here involved. Movement of gas in a gas well is not transportation of gas.

ORDER

WHEREFORE, IT IS ORDERED, subject to review by the Commission, that the application of Continental Oil Company filed on November 29, 1954 for a certificate of public convenience and necessity under the Natural Gas Act in Docket No. G-6346 be, and the same hereby is, dismissed for want of jurisdiction in the premises under the provisions of the Act.

EMERY J. WOODALL
Emery J. Woodall
Presiding Examiner

Filed: May 1, 1957
Issued: May 1, 1957

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Frederick Stueck, Acting Chairman;
Seaborn L. Digby, William R. Connole
and Arthur Kline.

In the Matter of
CONTINENTAL OIL COMPANY

Docket No. G-6346

ORDER ISSUING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

(Issued September 6, 1957)

This matter is before us on exceptions to the initial decision of the presiding examiner issued on May 1, 1957, and oral argument held on such exceptions July 22, 1957. The proceeding arises from the filing of an application by Continental Oil Company (Continental) for a certificate of public convenience and necessity (involuntarily and under protest), on November 29, 1954, pursuant to Section 7 of the Natural Gas Act (Act) and the Commission's order No. 174-A with respect to the sale of natural gas from a single well in Lea County, New Mexico, to El Paso Natural Gas Company (El Paso). Continental prays that the Commission enter an order disclaiming jurisdiction over the sale and dismissing the application. If, however, the Commission should require a certificate of public convenience and necessity for the sale, Continental requests issuance of a certificate to authorize the continued sale of gas pursuant to the terms and conditions of its contract with El Paso.

The issue involved is whether this transaction brings Continental within the jurisdictional requirements of the Natural Gas Act as to this sale and as to the facilities owned

by it. If the Act creates such jurisdiction in the Commission, it is undisputed that a certificate should be issued on the basis of the record.[1]

The presiding examiner has dismissed the application for want of jurisdiction in the premises under the provisions of the Act. We, however, find that Continental's sale to El Paso is a sale in interstate commerce requiring a certificate for the sale and the facilities therefor, and we are issuing such a certificate, all as set forth below.

The facts involved are as follows: Continental has sold gas from the well in question located in the Langmat Field to El Paso under a contract dated July 17, 1948, as subsequently amended. The gas produced flows from the well through what is commonly known in the oil and gas industry as a "Christmas tree". The casinghead, two master valves and their connections (which are part of the Christmas tree) are owned by Continental. Two swages, a tee, a needle valve, which is part of the Christmas tree, and a horizontal flow line which is connected to the Christmas tree, were installed and are owned by El Paso. The stream of gas moves up into the Christmas tree which it leaves by means of El Paso's horizontal flow pipe. From this point the gas travels underground about 112 feet to El Paso's heater, thence to El Paso's meter run where El Paso measures and samples it, and thence it flows to El Paso's valve manifold which is approximately 150 feet from the well. Next the stream travels about one-half mile to El Paso's field compressor where it is commingled with gas from other wells in the same field. Its pressure is boosted above that of El Paso's field system into which it is then

[1] A petition for declaratory order filed concurrently with Continental's application (and given the same docket number) raises the same issues as Continental's prayer for a disclaimer of jurisdiction.

injected and through which it is moved to one of El Paso's gasoline plants.

The record shows that possession and control of the stream of gas passes to El Paso when it enters El Paso's swage (which is part of and near the top of the Christmas tree), and Continental has no title, interest or control over any part of the stream after that point. El Paso computes the volume produced and shuts in the well or regulates its rate of flow by operating the valve in El Paso's valve manifold. While Continental's valves on the "Christmas tree" are not utilized to control the rate of flow, because to do so would cause undue wear on the valve seats and would be highly uneconomic, these valves could be operated to discontinue completely the sale of gas to El Paso and thereby terminate service.

There is no dispute as to El Paso being a "natural-gas company" within the meaning of the Natural Gas Act since El Paso owns and operates an integrated natural gas transmission pipeline system located in the States of Texas, New Mexico and Arizona, and by means of such integrated system El Paso transports gas from various fields and delivers and sells such gas to direct industrial consumers, other pipeline companies, and gas distributing utilities in the foregoing states and California. Facilities of El Paso certificated by various Commission orders and opinions are used to transport natural gas in interstate commerce as integral parts of El Paso's interstate pipeline system.

In its application Continental avers that all or a portion of the gas sold by it on and since June 7, 1954, has been transported by El Paso in interstate commerce for resale or has been resold by El Paso to one or more other persons for resale.

Basically the evidence demonstrates that natural gas produced by Continental is sold to El Paso and delivered into

the interstate pipeline system of El Paso where it is commingled with other gas purchased by El Paso. Clearly, these circumstances establish the sale as a sale by a producer to an interstate pipeline company for resale.

It is claimed that El Paso produces the gas because El Paso controls the rate of flow of the gas, but control of the rate of flow does not necessarily carry with it the producing connotation. The record shows that Continental has been designated as operator of the properties by the other owners of working interests in the properties and by the Oil Conservation Commission of New Mexico. Furthermore, the contract between Continental and El Paso states that while the buyer shall have the right to regulate the flow of gas, "such regulation shall be subject to control by seller". Continental, as the operator of the well, is thus capable of controlling the production of the well and the gas is sold as produced with regulation of rate of flow being in the hands of El Paso so long as El Paso takes the gas in accordance with the pertinent rules, regulations and laws of the State of New Mexico. The arrangement is merely one of convenience. The fact remains as set forth on page 3 of the presiding examiner's decision " . . . sale of the gas of the well takes place in the wellhead . . . "

It is also contended that the sale by Continental is not a sale for resale in interstate commerce since the sale occurred before production was completed and before gathering had commenced, that El Paso, an interstate transmission company, had to complete the production and all of the gathering. However, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, the Court stated (at p. 682):

> . . . the legislative history indicates a Congressional intent to give the Commission jurisdiction over the rates of *all wholesales of natural gas in interstate commerce, whether by pipeline company or not, and whether*

occurring before, during or after transmission by an interstate pipeline company. (Emphasis added.)

The Court also stated that it cannot be argued that a sale of natural gas by an interstate pipeline company is exempt from the Commission's jurisdiction as part of production and gathering and (at pp. 680-681) "sales in interstate commerce for resale by producers to interstate pipeline companies do not come within the 'production' or 'gathering' exemption".

As previously stated, one of the category of sales held by the *Phillips* decision to be subject to the jurisdiction of the Commission is the sale of natural gas by any producer to an interstate pipeline company for resale made before, during, or after transmission by the pipeline company. Such a sale is subject to the jurisdiction of the Commission as "the sale of natural gas for resale in interstate commerce." This Commission, since the *Phillips* decision, has required a certificate of public convenience and necessity when a sale to an interstate pipeline company for resale is made. *Deep South Oil Company*, 14 F.P.C. ....., Op. No. 284, G-2952, September 9, 1955, affirmed ..... F. 2d .....; CA 5, No. 15849, June 29, 1957; *Saturn Oil and Gas Company*, 16 F.P.C. 461; *Continental Oil Company*, 16 F.P.C. 1, Op. 293; *Continental Oil Company*, 15 F.P.C. 627, affirmed ..... F. 2d ....., CA 5, No. 16130 decided June 29, 1957.

We can conclude that whether the sale is made prior to the transmission by the interstate pipeline company is immaterial in the light of the *Phillips, Deep South* and *Continental* decisions. We may also note that there is no provision in the Act which, fairly interpreted, can mean that interstate commerce begins upon the completion of processing. This Commission has held that the definition of "interstate commerce" in the Natural Gas Act is not so

shackled (*Deep South, et al., supra*). The only proper legal conclusion which can be drawn from the facts of the record is that the sale of gas by Continental to El Paso is a sale of natural gas in interstate commerce for resale, within the meaning of the Natural Gas Act, and is not exempt under the Act. Therefore, the sale is subject to the jurisdiction of the Commission and a certificate of public convenience and necessity authorizing such sale should issue. As a consequence, Continental is a "natural-gas company" within the meaning of Section 2 (6) of the Natural Gas Act.

We may now turn to the question of whether there are facilities involved here to be certificated. We may note first that in *Continental Oil* opinion No. 293, *supra*, we made it clear that the necessary factual determinations of facilities involved should be reached on the basis of the circumstances of particular cases. The Court in upholding our position has clearly shown that "facilities" apply to those facilities which serve the function of effecting the sale. *J. M. Huber Corporation* v. *F.P.C.*, 236 F. 2d 550, 556, certiorari denied, 352 U.S. 971.

Obviously in this case there is a facility called a "Christmas tree" between the producing well and the point of delivery to El Paso. It is apparent that under the Act a line must be drawn between sales facilities which must be certificated under Section 7 (c) and other facilities without which a sale could not be made but which are not sales facilities within the meaning of Section 7 (c) and for the operation of which no certificate is required. Drawing such a line requires consideration of the provisions and objectives of Section 7, of appropriate means for the attainment of the objectives of this section, of the characteristics of the producing segment of the natural-gas industry, of the administrative practicalities involved, and of such other circumstances as may exist in a given case. In this regard, Section 7 (c) in

referring to "facilities therefor" and "such facilities" reasonably applies to those facilities which serve the function of effecting the interstate sale or interstate transportation as the case may be.[2]

Applying these principles to the particular facts of Continental's operations, it is apparent that such portions of the "Christmas tree" that are owned by Continental and serve to contain the gas at the point of delivery are facilities for effecting the sale of gas in interstate commerce, *regardless whether they serve also to effect production. Saturn Oil and Gas Company, supra.* "Agere sequitur esse" says the logic primer: What a thing is is determined by what it does. It cannot reasonably be contended that the sale in this instance can be effectuated without the aid of Continental's facilities herein involved. This situation is analogous to the *Huber* case *supra*, wherein both the Federal District Court, District of New Jersey, and the Third Circuit agreed with the Commission that as Huber was engaged in interstate sales it could be so engaged only by means of interstate selling facilities and that, therefore, it was subject to the Natural Gas Act and the selling facilities were jurisdictional.

This principle was previously applied and fully reasoned in the Second Circuit decision in *Hartford Electric Light Co. v. F.P.C.*, 131 F. 2d 953 (1942), certiorari denied, 319 U.S. 741. That case invoked jurisdiction under §201 (b) of the Federal Power Act. However, the provisions of the Natural Gas Act (see especially §§1 (b) and 7 (c)) are as effective affirmatively to confer jurisdiction over facilities for sale or, disjunctively, for transmission, as are the comparable provisions of the Federal Power Act. In the *Hartford* decision one of the alternative grounds on which

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[2] See *Argo Oil Corporation*, 15 F.P.C. 622, 624.

the majority of the Court found jurisdiction was the pragmatic test, whether the facilities in issue (generation facilities in that case — production facilities here) were used as "aids to such [interstate] sales." The Court said:

> Even if we assume that generation facilities are not within the Commission's jurisdiction under §201 (b) [of the Federal Power Act] or any other portion of Part II, and also that petitioner has no facilities for interstate transmission, still petitioner's contention is untenable; Section 201 (b) confers jurisdiction over not only facilities (1) for interstate *transmission* but also — and *disjunctively* — over facilities (2) for interstate wholesale *sales*. If the Commission has no jurisdiction under §201 (b) over generation facilities, then that part of the section conferring jurisdiction over facilities for interstate wholesale sales becomes meaningless . . . (P. 961)
>
> . . . the Commission, under §201 (b) has jurisdiction of generation facilities when used in connection with wholesale interstate sales, because jurisdiction of facilities for such sales is "specifically provided" in that section. (P. 962)

Although the facilities of Hartford used for dual purposes were said to be exempt from Commission jurisdiction as generating facilities, they were held not to be exempt as facilities for the wholesale of electric energy in interstate commerce. See also *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581, 600-602; *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 468-471.

Upon review of the entire record in this proceeding, including the Initial Decision of the presiding examiner, the exceptions thereto, and oral argument before us, it seems clear to us that we will be complying with the mandate given to us by Congress, as interpreted by the Courts, when we require Continental to apply for a certificate of public

convenience and necessity as a natural-gas company as defined in Section 2 (6) of the Natural Gas Act and not exempt under Section 1 (b).

The Commission further finds:

(1) Applicant, Continental Oil Company, an independent producer of natural gas, is engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sale of natural gas hereinbefore described, as more fully described in the application, is made in interstate commerce subject to the jurisdiction of the Commission, and such sale by Continental, together with the operation of any facilities (which are included in the Christmas tree involved herein), subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of Subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Continental is ably and willing properly to do the acts and to perform the services proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission thereunder.

(4) The sale of natural gas by Continental, together with the operation of any facilities subject to the jurisdiction of the Commission necessary therefore, is required by the public convenience and necessity, and a certificate therefor should be issued as hereinafter ordered and conditioned.

(5) Continental's petition for a declaratory order that the Commission does not have jurisdiction over the sale

involved herein and the facilities utilized therefor should be denied.

(6) Such contentions, objections and exceptions as are not specifically disposed of in the foregoing are without basis in law or support in fact.

The Commission orders:

(A) A certificate of public convenience and necessity is hereby issued, upon the terms and conditions of this order, authorizing the sale by Continental of natural gas in interstate commerce for resale, together with the continued operation of any facilities (which are included in the Christmas tree involved herein), subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce, as hereinbefore described and as more fully described in the application and exhibits in this proceeding.

(B) The certificate is not transferable and shall be effective only so long as Continental continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(C) The grant of the certificate herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the services herein authorized, and is without prejudice to any findings or orders which have been or many hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Continental. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provisions in the gas purchase contracts herein involved.

(D) Continental's petition for a declaratory order that the Commission does not have jurisdiction over the sale involved herein and the facilities utilized therefor is hereby denied.

(E) Exceptions filed with respect to the initial decision of the presiding examiner which are inconsistent with our action herein are hereby denied.

By the Commission. Commissioner Digby concurring, subject to the statement attached.

MICHAEL J. FARRELL,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby and Arthur Kline.

In the Matter of Continental Oil Company } Docket No. G-6346

ORDER DENYING APPLICATION FOR REHEARING

(Issued October 24, 1957)

On October 4, 1957, Continental Oil Company filed an application for rehearing under Section 19(b) of the Natural Gas Act of our order issued September 6, 1957. In that order we determined that Continental's sale of gas from a single well in Lea County, New Mexico, to El Paso Natural Gas Company is a sale in interstate commerce for resale and subject to our jurisdiction, as are the facilities which are part of the "Christmas tree" at the top of the well used in effecting the sale. We granted a certificate of public convenience and necessity for the sale and for the facilities involved. Most of the points made by Continental in its exceptions have already been carefully considered and are covered by our previous order, but the following additional comments may serve to make our position clearer, and dispose of further points raised by Continental in its exceptions.

Continental contends that its sale to El Paso made in the Christmas tree is not a sale in interstate commerce because, it says, production has not been completed. We have already seen that in accordance with the *Phillips* case[1] sales are not taken out of interstate commerce by the production or gathering exemptions of Section 1. (b) of the Act. It follows that the court thought that a sale, even if it be as-

[1] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 680-681.

sumed to occur during production or gathering, is nevertheless a sale in interstate commerce. As has been said, natural gas becomes a subject of commerce when it is reduced to possession. *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 586. Certainly possession is obtained by Continental at some point either at or prior to the point of transfer of title to El Paso in the Christmas tree. In fact, it seems clear to us that Continental could not make a sale of the gas until it has possession, and once it has possession and sells the gas for transmission out of the state, the sale is a sale in interstate commerce, for it has been decided that the purchase of a commodity in one state for shipment out of the state is a transaction in interstate commerce. *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50; *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189. The movement of the gas through pipes or valves of the Christmas tree, or part of it, and eventually through a heater, compressor and processing plant plainly does not change the interstate character of the business. The practical result of the transaction is not affected by the fact that the gas passes through part of Continental's Christmas tree. "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States*, 196 U.S. 375, 398.

In its order of September 6, 1957, the Commission cited *Hartford Electric Light Co.* v. *F.P.C.*, 131 F. 2d 953 (C.A. 2), certiorari denied, 319 U.S. 74, to show that facilities exempt for one purpose (regulation of generation) were jurisdictional as facilities for the sale of electric energy at wholesale in interstate commerce. Continental attempts to distinguish the *Hartford* case by the argument that Section 201 (b) of the Federal Power Act (16 U.S.C. 824 (b)) grants to the Commission jurisdiction over *all* facilities for

transmission or sales subject to the Commission's jurisdiction, while the Natural Gas Act, it says, does not contain an express grant of jurisdiction over facilities. What Continental has overlooked is that as we have already indicated in our previous order an express grant of such jurisdiction is contained in Section 7 (c), providing:

> "No natural-gas company * * * shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission * * *."

Continental also contends that the Commission has not closely defined the jurisdictional facilities certificated herein. These are the facilities, in the words of Section 7 (c) of the Act, which are for the "sale of natural gas, subject to the jurisdiction of the Commission." As Continental points out, this language might be given a very broad and, we believe, unreasonable interpretation. The Commission has in this case, however, limited its certificate very narrowly to the most immediate facilities, part of the Christmas tree, owned by Continental, and serving to contain the gas at the point of delivery. The Christmas tree in this case, which is normal for this type of well, is a structure extending some six or seven feet from the ground and consisting of the casinghead, two master valves, a bleeder valve and a ten-inch piece of four-inch pipe between the master valves, all owned by Continental, and on top of these two reducing swages, a tee and a needle valve owned by El Paso. A two-inch diameter pipe owned by El Paso extends from the tee to El Paso's metering facilities. Since the order limits our determination to the Christmas tree it is not

necessary to go to the arbitrary length of determining just what piece of pipe, valve, or both, should be included. Of course, it follows that if the sale were effected at a different point, it might be necessary to redefine the jurisdictional facilities used in making the sale.

With respect to the Christmas tree Continental objects to our describing it in the original order as a facility between the producing well and the point of delivery, saying that the Christmas tree is part of the well. Whether the Christmas tree, in which delivery is made, is technically a part of the well is immaterial. The record clearly sets forth the physical facilities and the exact point of delivery. What is material is that Continental owns facilities by means of which it possesses, delivers and sells the gas and it is those facilities that are subject to this Commission's jurisdiction.

Continental objects to the issuance of a certificate of unlimited duration saying that the certificate should conform to the term of its gas sales contract with El Paso.[2] It cites *Sunray Mid-Continental Oil Company* v. *F.P.C.*, 239 F. 2d 97 (C.A. 10), in which the court held, as Continental points out, that this Commission had authority to issue certificates of limited duration, but also held that the Commission was not required to issue a certificate of limited duration saying that if the Commission was to have power to protect the public, it must be able to prevent the natural-gas companies abandoning service as they chose. In a proper case the court said the Commission could grant a certificate of

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[2] The agreement referred to in the application is dated June 23, 1949. It incorporates the provisions of a prior agreement dated July 17, 1948, whose term runs fifteen years from June 1, 1948 "and thereafter from month to month until terminated by either party upon not less than sixty (60) days prior written notice to the other." We agree with Continental that it is more accurate to refer to the June 23, 1949 agreement as the sales agreement rather than to the "contract dated July 17, 1948, as subsequently amended" as we did in our order.

limited duration — that is where "legal, physical, financial or other factors" might warrant it, but the burden is on the applicant to establish such a case.[3] No reason is given by the applicant nor is there anything in the present record which would justify our limiting the duration of the certificate except the mere fact of the contract term, and that we do not consider sufficient, for if we based our action on that alone, we should lose substantial control over the abandonment of service. We have properly found that Continental is able and willing properly to do the acts and to perform the services proposed. This is entirely true as of the present time. It becomes no less true that at some future time the contract may expire and Continental may be unable or unwilling to continue service. That prob'em can properly be approached only when it arises.

A final contention is made by Continental. It says that it should have been permitted to answer the staff's exceptions to the presiding examiner's decision. In not being permitted to do so, it says, it was deprived of due process and of the equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. However, in this proceeding it is clear that Continental has had ample opportunity to get its views before us. After the completion of the hearing, it filed a brief and a reply brief in answer to that of staff counsel. Since the presiding examiner's opinion was favorable to it, Continental filed no exceptions, but, of course, presented its oral argument before the Commission in the light of those exceptions.

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[3] The Supreme Court reversed the decision of the Court of Appeals on another ground. The Supreme Court held that the Court of Appeals, after holding the Commission had erred in deciding that it could not issue a certificate of limited duration; should have remanded the proceeding to the Commission instead of affirming the Commission's decision (353 U.S. 944).

Continental's objections seem to proceed from a misconception of the Commission's function on exceptions to an examiner's decision. The Commission is not dependent upon a new round of briefs and oral arguments, nor is it limited to the issues raised by the exceptions. The Administrative Procedure Act expressly provides that it shall "have all the powers which it would have in making the initial decision" (5 U.S.C. § 1007). Under the Natural Gas Act the presiding examiner is but the "representative of the Commission designated by it" (Natural Gas Act § 15 (a)), not an independent agency or tribunal. On exceptions the Commission supersedes its agent and the full record including the transcript of the hearing, exhibits, etc., the briefs submitted before the presiding examiner, and the transcript of any oral argument before the examiner, as well as the examiner's report and exceptions thereto, are before the Commission. Part of the large number of copies of pleadings, exhibits, reporters' transcript, briefs, etc., required by the Commission rules is accounted for by the necessity of providing a set for each of the five members of the Commission at this stage of the proceeding. And beyond this, our rules are designed to make sure that every party shall completely argue its case, not holding back any contentions for a later round of briefs, by explicitly providing that (§1.31 (c)) "no matter not included in the exceptions filed as provided in this section may thereafter be objected to before the Commission upon brief or oral argument, or in an application for Commission rehearing."

Exceptions with supporting reasons are narrowly limited to what is necessary to bring into focus the issues remaining in controversy. There is no provision for briefs either in support of or in opposition to exceptions (§1.31 (b)). They are considered upon the whole record, in the light of the original briefs, the transcript of any oral argument

before the presiding examiner, and oral argument before the Commission itself, if such argument is had.

As the court said in *N.L.R.B.* v. *Eclipse Lumber Co.*, 199 F. 2d 684, 686 (CA 9) we know of no right that Continental has to reply to exceptions, and certainly there was nothing so novel in staff counsel's exceptions to prejudice Continental in any way. In any case it had a further chance to place its viewpoint before us when it exercised its statutory right to file an application for rehearing in which it set forth its arguments in full with citations of authorities. As has been said, "* * * due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties." *Market Street Railway Co.* v. *Comm'n*, 324 U.S. 548, 562. "The requirements imposed by that guaranty are not technical, nor is any particular form of procedure necessary." *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710.

The Commission finds:

(1) No sufficient grounds have been shown by Continental for limiting the term of its certificate of public convenience and necessity issued by the order of September 6, 1957.

(2) The application for rehearing of our order issued on September 7, 1957, in this proceeding, except as stated above, sets forth no new facts and no principles of law which either were not fully considered by the Commission when it issued that order or which having now been considered warrant any change in or modification of such order. All contentions and objections not specifically discussed or referred to herein have been considered and found either without basis in law or support in fact, but are not sufficiently material to warrant individual treatment.

The Commission orders:

The application for rehearing filed by Continental on October 4, 1957, with respect to our order issued September 6, 1957, is hereby denied.

By the Commission.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

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FILED
AUG 12 1959

No. 293

In the Supreme Court of the United States

October Term, 1959

CONTINENTAL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 1a–27a) is reported at 266 F. 2d 208. The orders of the Federal Power Commission issuing a certificate (Pet. App. 41a–51a; R. 190–197) and denying rehearing (Pet. App. 52a–59a; R. 258–262) are reported at 18 FPC 296, 528.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1959 (Pet. App. 28a). The petition for a writ of certiorari was filed on July 11, 1959. The jurisdiction of this Court is invoked under 28 U.S.C.

1254(1), and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

This case involves the operation by an independent producer, for an admittedly jurisdictional sale to a pipeline, of part of the "Christmas tree" at the head of a gas well. The questions presented are:

1. Whether the decision of the court of appeals was based on an independent ground not advanced by the Commission.

2. Whether the producer's well-head facilities at the point of delivery to the pipeline are facilities for a jurisdictional sale and therefore subject to the jurisdiction of the Commission, rather than facilities for production and within the statutory provision exempting "production" from such jurisdiction.

3. Whether the producer's well-head facilities at the point of delivery are, alternatively, subject to the jurisdiction of the Commission as facilities for a jurisdictional sale even though they also are facilities for production.

STATUTES INVOLVED

Sections 1(b) and 7(c) of the Natural Gas Act (15 U.S.C. 717(b) and 717f(c)) are set forth in the Appendix to the Petition at pages 29a–30a.

STATEMENT

Petitioner, an independent producer of natural gas, owns well-head facilities, including part of the "Christmas tree" apparatus (see photograph facing Pet. 6), and sells at the well-head to an interstate pipeline. Petitioner drilled the well, constructed the

facilities, and commenced deliveries prior to this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, that independent producers which sell gas in interstate commerce for resale are "natural-gas companies" and therefore subject to regulation under the Act. As a result of that decision and the Commission orders which followed, petitioner applied for a certificate under protest, at the same time requesting a declaratory order of non-jurisdiction.

Petitioner urged in its briefs to the court of appeals, as it had before the Commission, (a) that the Commission lacked jurisdiction over any of the well-head facilities, including its portion of the "Christmas tree"; (b) that the Commission must specify the particular facilities over which it asserts jurisdiction; and (c) that the Commission lacked jurisdiction over the sale to the pipeline. On oral argument below, petitioner abandoned its second and third points and does not present them to this Court.

The relevant facts are undisputed. Petitioner owns the well casing and part of the "Christmas tree" consisting essentially of two valves and some connecting fittings. While these valves are capable of shutting-off the flow of gas (and were so used for some months between completion of the well and commencement of deliveries), they are not suited to use for controlling the flow. Petitioner's facilities end in a threaded four-inch aperture at the top of the upper of the two valves, into which the pipeline's facilities are screwed. Delivery of the gas is effected at that point.

The Commission held the portion of petitioner's facilities which contains the gas at the point of delivery to be a jurisdictional facility and certificated its continued operation. The Commission, looking from the point of delivery downward, found it unnecessary to determine just how far the jurisdictional portion of the facilities extended (Pet. App. 54a–55a). Although the court of appeals by way of *dicta* examined the facilities from the ground upward (Pet. App. 5a-6a), it *held* that at least the upper aperture[1] of the upper valve was a jurisdictional facility (Pet. App. 6a).

ARGUMENT

Petitioner's basic contention is that its well-head facilities, including its portion of the "Christmas tree" apparatus, were not facilities for interstate sale requiring a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), but were instead facilities for production excluded from Federal Power Commission jurisdiction by Section 1(b) of the Act, 15 U.S.C. 717(b), which exempts the "production or gathering" of natural gas from the coverage of the Act. Both the Commission and the court of appeals, however, held that petitioner's facilities were facilities for a jurisdictional

[1] Petitioner states (Pet. 18) that the court's "adjudication" was "that the top valve of the christmas tree is solely a sales facility." However, the court's holding, like the Commission's, applies to the point of delivery at the upper aperture of that upper valve: "* * * production, as the term is used in this statute, was complete at or before the passage of the gas through the upper aperture of the upper valve." 266 F. 2d at 212; Pet. App. 7a.

sale and this determination is correct under the principles laid down by this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682. Petitioner neither raises any serious question of federal law requiring clarification by this Court, nor cites any conflicting decisions in other circuits. In fact, two other courts of appeals have sustained the jurisdiction of the Commission over producer or gatherer facilities despite similar objections. *Saturn Oil & Gas Co.* v. *Federal Power Commission*, 250 F. 2d 61 (C.A. 10), certiorari denied, 355 U.S. 956; *J. M. Huber Corp.* v. *Federal Power Commission*, 236 F. 2d 550 (C.A. 3), certiorari denied, 352 U.S. 971. Moreover, in all of the hundreds of instances in which sales by independent producers, in a variety of factual patterns, have been certificated, the Commission, as in the instant case, has also certificated the operation of facilities for such sales. Although the petition touches upon various peripheral questions which are conceivably lurking in the background of the case, such questions do not demand immediate consideration and should not be settled on this record.

1. Petitioner claims that the rationale of the Commission's order, that petitioner's facilities were facilities both for sale and production, was rejected by the court of appeals which based its decision on its own independent finding that some of petitioner's facilities were purely facilities for sale and not production (Pet. 7–9, 17–18). Petitioner further argues (Pet. 8, 17–18) that such a finding is invalid since the power of the court of appeals is limited to

deciding "whether there was substantial evidence to support the Commission's findings and whether the Commission's order was within the ambit of its statutory authority" (Pet. 8). In fact, however, as the court of appeals properly held (agreeing with the argument of the Commission below), the Commission's orders rested on two independent grounds: *first,* that petitioner owns jurisdictional facilities at a point in the "Christmas tree" where production is already completed; and, *second,* that, in any event, petitioner's facilities were within the jurisdiction of the Commission even assuming they perform the dual functions of effecting the sale and the production (Pet. App. 4a). The court of appeals stated that "a strong argument can be made" for the second proposition (Pet. App. 4a), but based its affirmance on the first ground (Pet. App. 5a). Thus, the court of appeals made no independent findings, but rather merely chose between alternative holdings of the Commission.[2]

2. The first alternative ground for the Commission's decision would limit the certificated facilities to a minimum, by not asserting jurisdiction over production facilities. The Commission reasoned that the gas sold here as a commodity in interstate commerce cannot be sold until it has been reduced to possession and that this reduction to possession prior to sale completes production since production of natural gas is

[2] Petitioner, significantly, insisted in the court of appeals that only the first ground, the exclusive-function rationale, underlay the Commission's order (Reply Brief of Petitioner, pp. 13–14). Now that the court of appeals has adopted this rationale, petitioner is claiming that the Commission's decision was based on a different ground.

just that—the reduction of gas to possession (Pet. App. 46a–47a, 52a–53a). See *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 586, cited by the Commission (Pet. App. 53a). Hence, the facilities by which it is possessed, *i.e.*, the containing facilities at the point of delivery, are facilities at or beyond the point at which production is completed, and are not facilities for production.

3. The Commission was also correct in finding that petitioner's facilities, being facilities for a jurisdictional sale, were within the Commission's jurisdiction even if they were likewise facilities for production. In *Phillips, supra*, this Court stated that "we have difficulty in perceiving why the Commission's jurisdiction over the transportation *or* sale for resale * * * is granted in the disjunctive" in Section 1(b) when "[i]t would have sufficed to give the Commission jurisdiction over only those natural-gas companies that engage in 'transportation' or 'transportation *and* sale for resale' in interstate commerce, if only interstate pipeline companies were intended to be covered." 347 U.S. at 681–682. Similarly, the "sale" portion of the "transportation or sale" clause of Section 7(c) would have no meaning unless the disjunctive grant of jurisdiction applied to the sale and delivery facilities of a producer-seller whether or not "production" was considered to be technically completed. Moreover, this Court has made clear that the intent of Congress in passing the Natural Gas Act was to give the Commission broad powers for effective public regulation of the industry and has therefore held that the production and gathering exemption is to be strictly con-

strued. *Interstate Natural Gas Co.* v. *Federal Power Commission, supra,* 331 U.S. at 690–691; *Phillips Petroleum Co.* v. *Wisconsin, supra,* 347 U.S. at 679–680, 685. Since in the instant case the certificate regulation was plainly aimed at sales, not physical production or gathering, the exemption should be narrowly interpreted so as not to interfere with the broad intent of Congress.[3]

4. The present decisions of the Commission and the court of appeals are supported by the *Saturn* and *Huber* decisions, *supra.* In the former, contrary to the present petitioner's contention that only an issue of sales not facilities was involved (Pet. 16), the Court of Appeals for the Tenth Circuit made clear that the objection was raised "that the effort to certify production facilities violates the production or gathering exemption." 250 F. 2d at 69. Moreover, the court, in rejecting that objection, stated that "[t]he test is whether the continued operation of a facility is necessary to the delivery of the gas sold." *Ibid.* And the facts in *Saturn* were virtually identical with those here, the only difference being that, while the purchasing pipeline there, as here, regulated the flow of the gas, it used a valve owned by the producer to do so.

[3] As the court of appeals noted (Pet. App. 8a), the Commission's important regulation of the abandonment of a sale under Section 7(b), 15 U.S.C. 717f(b), depends on whether the Commission has jurisdiction over facilities by means of which such sale is made. In the present case, the choke owned and operated by the pipeline to control the volumes delivered might provide additional jurisdictional facilities supporting Commission jurisdiction under Section 7(b) over abandonment of this sale.

While petitioner attempts to distinguish *Huber* on the ground that "clearly" sale facilities were involved (Pet. 16–17), the Commission had certificated a facility, similar to the "Christmas tree" here, which used valves and pipes to effect the delivery and sale of natural gas. The Court of Appeals for the Third Circuit held that the "gathering" portion of the "production or gathering" exemption of Section 1(b) did not exclude the jurisdiction of the Commission because "[t]he Phillips decision makes such facilities, sales facilities." 236 F. 2d at 556.[4]

5. Petitioner objects that the decision below endangers its freedom to drill and equip wells by placing producers between strict state regulation for conservation purposes and federal regulation as to the same activities (Pet. 11, 18–19). Since, however, petitioner's facilities were constructed prior to this Court's *Phillips* decision, at a time when the Commission disclaimed jurisdiction over independent producers, the facts of this case pose no such issue. But, in any event, the Commission has not attempted to require certificates for *construction* of producer facilities, but only for operation of facilities for jurisdictional sales. Where additional wells are drilled on acreage already dedicated to jurisdictional service no

[4] Petitioner's reliance (Pet. 7–8, 15–16) on *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, is misplaced. That case, which raised abandonment issues under Section 7(b) of the Act, merely holds that a pipeline's *undeveloped* subterranean gas reserves are not jurisdictional "facilities" and so may be alienated without Commission authorization. It does not govern this case, in which the producer's well-head facilities are operated to effect the jurisdictional sale.

problem arises; the initial certificate covers facilities for sale from the acreage, not particular wells. Where a well is drilled on undedicated land, Section 7(c) probably does not apply since at that stage the producer, who cannot know what disposition he will make of the gas (or even whether gas will be reached), has not undertaken the construction for a jurisdictional sale. Furthermore, the Commission has not hesitated to avoid unnecessary regulation by construing the term "facilities" in Section 7(c) to exclude those facilities which merely replace unserviceable ones, without causing any appreciable change in the service rendered. 18 C.F.R. (1958 Cum. Supp.) 2.55(b). And the Commission has expressly sought in its abandonment regulation applying to independent producers to avoid conflict with state regulation (18 C.F.R. (1958 Cum. Supp.) 157.30):

> That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas.

If petitioner's bare allegations of interference with local regulation (Pet. 18–19) are meant to encompass further problems, they are not demonstrated by this record. Cf. *Interstate Natural Gas Co.* v. *Federal Power Commission, supra,* 331 U.S. at 690–692.

6. Petitioner also insists that the "uncontradicted evidence" of its engineering witness that its "Christmas tree" was a facility for production and not for sale is binding on the Commission (Pet. 17). Of course, the undisputed testimony as to the evidentiary facts being adjudicated must be, and was, accepted.

But petitioner's opinion testimony as to ultimate conclusions to be drawn from such facts is not binding. Construction of the statutory terms "facilities," "sale," and "production," as well as their application to the evidentiary facts established, is a task for the Commission, subject to judicial review. See Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239 (1955); cf. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 Vand. L. Rev. 470 (1950). Here, as the court of appeals held (Pet. App. 6a–7a), the Commission's orders were based on the determination that, as these terms are used in the statute, a portion of "Christmas tree" was, alternatively, either a facility for sale and not for production, or a facility for both sale and production (see *supra*, pp. 5–6).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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August 1959.

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IN THE

Supreme Court of the United States

OCTOBER 1959 TERM

No. 203

CONTINENTAL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

The Commisison's Brief in Opposition permits us to focus the issues in their true perspective.

THE COMMISSION'S CONTINUING MISAPPREHENSION OF SECTION 7(c)

The Commission has been at pains to make it appear that its power to certificate a producer's sale cannot arise unless the producer has at the same time facilities available for certification as "facilities for sale". The fact that Section 7(c) authorizes certification of sale alone and apart from whether the producer has facilities for sale, the Commission ignores. The fact that such power granted by that Section supports and is consistent with the dominant purpose of Congress to regulate and control *sales* in interstate commerce for resale, the Commission disregards. (See Petition, p. 12-13.)

This misconception even leads the Commission (Br. p. 7) to transpose this Court's holding in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, to the disjunctive provisions of Section 7(c). But in *Phillips*, this Court declared the disjunctive language of "transportation or sale for resale" had effect to broaden and enlarge, not to narrow and restrict, Commission jurisdiction. The disjunctive provisions of Section 7(c) despite the Commission's misleading, equally enlarges and broadens jurisdiction. For that Section authorizes a certificate for a sale, irrespective of facilities, as well as a sale where there are also "facilities for sale." In Petitioner's submission, Congress by that language recognized there could be sales in interstate commerce for resale where the seller had no facilities for sale, and thus carefully made provision for certification thereof.

The passing suggestion (Br. p. 8 Fn. 3) that Section 7(c) must require a sale to be accompanied by "facilities" because Section 7(b) enforcement against abandonment depends on facilities, finds no support in that Section. A certificate of sale alone arms the Commission with all power needed to enforce Section 7(b). The sale is paramount. Guarantee of its continuance to depletion of the supply is the purpose of Section 7(b). If the supply be cut off "without the permission and approval of the Commission first had and obtained", the Commission would have available for use the full armament of Section 7(b). The presence of "facilities" would add nothing to the Commission's power to prevent shutting off of the flow of gas. If the conditions of a certificate of sale thus issued were breached, the full power of Sections 21(a) and (b) would be applicable. It is clear that "facilities" are not the central core of Section 7(c) power. If the producer does have and operate facilities *for sale*, Section 7(c) also provides for their certification. But the thing that counts, that incites

Commission power of regulation, is the sale and its continuance.

THE BREACH OF SECTION 1(b)

The refusal to respect the plain meaning of Section 7(c), the notion that certification of a facility is prerequisite to certification of sale, has led the Commission to grab a prohibited production facility (See Petition p. 10-11).

It has conceded (Br. p. 3) that the Christmas tree valves "are not suited to use for controlling the flow" of gas. This confesses Petitioner's claim and the demonstration of the uncontradicted record that the Christmas tree valves are not and cannot be facilities for sale. A "facility for sale" can only be a contrivance designed to control the rate and quantity of flow, and thus delivery. The purchaser (El Paso) owns and operates those facilities here.

The Commission admits (Br. p. 3-4) that Petitioner's facilities end at the point where El Paso's facilities are attached, so that delivery of the gas is effected at that point. But "that point" is El Paso's facility inserted in the well-stream before production is completed. Thus the "holding" of the Commission (Br. 4) is directed not at Petitioner, but at the purchaser.

Indeed, the Commission frankly declares El Paso's facilities are the sales facilities jurisdictional to the Commission and subject to its Section 7(b) power (Br. p. 8, FN 3).

In the light of these concessions, we need only to refer to our discussion (Petition p. 14-17) demonstrating that Section 7(c) does not authorize the Commission to invade the prohibited area of Section 1(b), and that as the Commission has represented to this Court (Petition p. 15), Section 1(b) does not affect its jurisdiction over sales.

These concessions make strange the claim (Br. 5-6) that the Commission, and the Court below, found that the Peti-

tioner had "facilities" purely for sale. The Commission Order (App. 41a) issuing certificate, and its Order denying rehearing (App. 52a) will be searched in vain for any such holding. On the contrary, those orders clearly set forth that the Commission recognized Petitioner's facilities to be production facilities, but under what it misconceived the compulsion of Section 7(c), declared they aided and abetted a sale. Said the Commission, " * * * it is apparent that such portions of the Christmas tree that are owned by Continental and serve to contain the gas at the point of delivery are facilities for effecting the sale of gas in interstate commerce, *regardless whether they serve also to effect production.*" (Italics by the Commission, App. p. 47a.)

The uncontradicted evidence was that the Christmas tree valves had nothing to do with the sale of gas, and neither by design or practical operation permitted regulation of the flow and volume of gas delivered (R. 106). This is not, as the Commission would have it, "opinion testimony" or "ultimate conclusions * * * drawn from * * * facts" (Br. p. 11), but is fact testimony standing without contradiction. It forbids any "conclusion" that the Christmas tree valves can constitute or "serve" as a sale facility. Regardless of whether the Commission or the Court below made the finding, it is against the uncontradicted evidence by which both are concluded (Petition p. 17-18).

It seems clear not only that there is an entire want of administrative and judicial power to invade the prohibited area of Section 1(b); but that, power aside, the plain, clear authority of Section 7(c) authorizing certification of sale alone destroys all semblance of justification for such invasion.

THE HUBER AND SATURN CASES

The Commission contends that the courts in *Saturn Oil & Gas Co.* v. *Federal Power Commission* (10 Cir. 1957) 250

F. 2d 51, cert. den. 355 U.S. 956, and *Huber Corporation* v. *Federal Power Commission* (3 Cir. 1956) 236 F. 2d 550, cert. den. 352 U.S. 971, sustained jurisdiction "over producer or gatherer facilities despite similar objections" (Br. p. 5). We think the claim incorrect. In neither case did the producer raise the issues posed here. In each, the producer contested jurisdiction of the sale involved. In each, the facts were quite different from those here.

But the Commission says that *Saturn* presented claim that the effort to certify production facilities violated the production exemption (Br. p. 8). Following the Commission reference is the declaration (quoted Pet. p. 16) that the record disclosed no controversy "whether any particular facility is within or without" Commission jurisdiction. Read in context the opinion clearly discloses that the issue here was never raised or considered there; that the role played by facilities was simply in aid of the contention that the sale was jurisdictionally untouchable.

The Commission, of course, confesses a difference in the facts (Br. p. 8). This difference is basic. In *Saturn*, the producer installed and attached to the Christmas tree, "side gate valves", and "a few inches of pipe between the 'Christmas tree' and the meter of the purchasing company" (250 F. 2d at 63). These were obviously installed for the purpose of making the sale; their function, to regulate and control the rate of flow and quantity of delivery. Petitioner here installed none such. Facilities comparable in purpose and use to those of *Saturn* were installed and operated here by the purchaser, El Paso. It is El Paso's facilities which the Commission confesses are jurisdictional (Br. p. 8, FN. 3).

These substantial differences put in true perspective the Court's discussion of "facilities" (p. 69). They confirm

accuracy of the Court's statement that the case involved no jurisdictional controversy over facilities.

The Commission's attempt to liken the gate valve box and Tee shaped pipe line in Huber to Petitioner's Christmas tree (Br. p. 9) is unfaithful to that case. Petitioner's Christmas tree is bolted to the casinghead at the top of the well (Pet. p. 6, Exhibit 3 attached). Huber's gate valve box and Tee pipeline were attached to the converging end point of an extensive gathering system of pipe lines several miles removed from the eleven wells connected to it.*

Contrary to the Commission's claim, Huber's gate valve box and Tee shaped pipe line had no remote "similarity" either physically or functionally to Petitioner's Christmas tree.

The Examiner found on the evidence that Huber's gate valve box and Tee pipe were facilities for sale. The Commission likewise so found, and the Court in affirming said, "This is a fact finding supported not only by substantial evidence on the whole case, but if not accepted by Huber, certainly not credibly contradicted" (p. 556). Further, the Court noted that Huber admitted these facilities were used in its sale (p. 555). Petitioner's characterization of *Huber* and *Saturn* (Pet. p. 16-17) correctly demonstrates that they do not support the claims of the Commission nor furnish reliance to the Court below.**

---

* *Huber's* eight mile gathering system is described in detail in the Presiding Examiner's decision, In the Matters of J. M. Huber Corporation, Docket Nos. G-3038 and G-4957. (See Pet. p. 16-17.)

** Equally wide of the mark is the citation of *Pennsylvania* v. *West Virginia*, (1922) 262 U.S. 553, 586 (Br. p. 7). The statement relied on is contained in a historical statement explanatory of the background of the suit, but having nothing whatever to do with any issue or evidence in support posed for decision.

CONCLUSION

As shown in the petition, it is respectfully submitted that certification of Petitioner's sale under Section 7(c) satisfies jurisdictional requirements of the Act and sufficiently clothes the Commission with all power granted it by the Act, so that the Commission's attempt, in violation of Section 1(b), to seize control of production facilities forbidden to it and unnecessary to the discharge of its lawful jurisdiction should be repulsed by this Court. Accordingly it is urged that a writ of certiorari to review the judgment of the Court below should be granted.

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